17-678

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1057.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY, APPELLANT,

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1882.

8

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Friday, the seventh day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

WILLIAM H. BRADLEY, *Clerk.*

THE ESCANABA AND LAKE MICHIGAN TRANSportation Company
vs.
THE CITY OF CHICAGO. } 17692. In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-eighth day of November, A. D. 1881, came The Escanaba and Lake Michigan Transportation
2 Company, complainant, by its solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its bond for costs and bill of complaint in said entitled cause; which said bond and bill are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, December term, A. D. 1881.

THE ESCANABA AND LAKE MICHIGAN TRANSportation Company
vs.
THE CITY OF CHICAGO. } In chancery.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, we hereby agree and stipulate that execution may issue against our property for any costs taxed agianst it.

Dated this twent -eighth day of November, A. D. 1881.

J. L. HIGGIE.
A. G. VAN SCHAICK.
A. E. GOODRICH.

(Endorsed:) Filed Nov. 28th, A. D. 1881. W. H. Bradley, clerk.

6116——1

3 *Bill of complaint.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

To the honorable judges of the circuit court of the United States for the northern district of Illinois:

The Escanaba and Lake Michigan Transportation Company, a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Michigan, having its main office located at Marine City, in said State, brings this its bill against the City of Chicago, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois, and located within the said State of Illinois, and within the said northern district of Illinois.

4 And thereupon your orator complains and says that the Chicago River and the two forks or branches thereof, commonly known and designated respectively as the north branch and the south branch and the south fork of the south branch of the Chicago River, are navigable rivers, creeks, or waters leading into Lake Michigan, a large body of navigable water, and thence through divers other navigable waters into the River Saint Lawrence, and being such navigable rivers, creeks, or waters, the said Chicago River, and the said branches thereof, are, and for a long time have been, common public highways, free not only to the inhabitants of the said State of Illinois, but to the inhabitants of the United States.

That the said north and south branches and the south fork of the south branch of said Chicago River unite and form the main branch thereof at a point which is within the corporate limits of said city, and at a distance of about three-fourths of a mile from the mouth of the said main branch; that it, the said main branch, flows easterly from said point and empties into said Lake Michigan.

That the said City of Chicago has been built and established on each side of said main branch, and also upon each side of the said north and south branches and the south fork of the south branch of said river, and now extends over a large area of territory, reaching not only from

5 the shore of said Lake Michigan westward to the junction of the said north and south branches and the south fork of the south branch, but also for a long distance northward and along each side of the said north branch to the northern limits of said city, and southerly along the said south branch, and on each side thereof for a long distance to the southern limits of said city.

That the said north branch of the said river is so navigable the entire distance from its said junction with said south branch to the said northern limits of said city, and for a long distance beyond said limits, and the said south branch and the south fork of said south branch are also navigable from the said junction to the said southern limits of said city, and for a long distance beyond, and the said main branch is so navigable the entire distance from said junction to its mouth.

That along said main branch as well as along said north and south

branches on each side of the same respectively are constructed and maintained numerous docks, wharves, and landings, also lumber yards, coal yards, wood yards, and stone yards upon, over, and across which vessels of all kinds carrying freight, and navigating said Chicago River, and its said branches discharged and receive freight of all kinds.

6 That along the banks of said river and its branches are constructed, maintained, and operated numerous large grain elevators, storehouses, and warehouses, from which such vessels receive large amounts of freight, and into many of which large amounts of freight are delivered from such vessels; that at various places on and adjoining to the said banks of said river and its said branches, branch railroad tracks are laid connecting with the main lines of divers railroads leading from said city into the interior of the said State of Illinois, and other adjoining States, and that large amounts of freight are delivered from such vessels into and upon freight cars, placed and standing upon such branch railroad tracks for the purpose of being transported over such railroads.

Your orator further shows that many citizens of the State of Illinois and Michigan, and also of other States, long have been and of right were, and still are accustomed to navigate said Chicago River and the said branches thereof, to pass and repass along their courses and channels into and out of said Lake Michigan, and through and across said lake, and many of the same through and along said lake to and from other lakes and navigable waters, transporting passengers and carrying and delivering

7 to and at the said docks, wharves, lumber yards, coal yards, wood yards, warehouses, storehouses, and freight-cars, large quantities of lumber, coal, wood, iron ore, stone, and other goods brought in and upon such vessels from ports and places outside of said State of Illinois, and also carrying in and upon said vessels large quantities of grain, provisions, and other goods, wares, and merchandise, from such grain elevators, warehouses, storehouses, freight-cars, docks, and wharves to ports and places of destination outside of said city of Chicago, and said State of Illinois, thereby conducting an extensive and valuable trade and commerce between the said city of Chicago, in the State of Illinois, and the ports of Milwaukee, Sheboygan, Escanaba, Green Bay, Menominee, Muskegan, Detroit, Buffalo, Manistee, Marine City, Marquette, Duluth, and many other places on said Lake Michigan, and other navigable waters connecting therewith.

Your orator further shows that it is the owner of three certain steam vessels or propellors known and called by the respective names of the propellor Escanaba, the propellor Interocean, and the propellor Arganaut, which said three propellors are each vessels of upwards of eleven hundred (1,100) tons burden, and are duly enrolled and licensed for the coasting trade, and are each employed by your orator in business of commerce and

8 navigation between ports and places in different States upon said Lake Michigan and the navigable waters connecting therewith, and particularly between the ports of Escanaba, in the State of Michigan, and the docks of the Union Iron and Steel Company, on the said south branch and the south fork of the south branch of the Chicago River, at a point over four (4) miles distant by the way of said river from the mouth of the said main branch of the Chicago River, transporting iron ore from Escanaba aforesaid to the said docks within the interior of said city and

said State of Illinois, and delivering the same to said Union Iron and Steel Company; that it, your orator, is under contract with said company to continue in said business of transporting such ore for and during the balance of the season of navigation for the present year, as well as for the seasons of 1882, 1883, 1884, 1885.

That the said propellors of your orator are duly enrolled and licensed at Port Huron and hail from Marine City, in the State of Michigan, that being there home port.

Your orator further shows that the said City of Chicago has at many places within its corporate limits built and now maintains bridges over and across the said Chicago River, as well as over the said branches thereof, thereby connecting certain public streets terminating at the bank
9 of said river on one side thereof with certain other public streets running from the opposite bank of said river.

That one of said bridges has been constructed and is now kept up and maintained by said city over and across the said main branch of said river, extending from the point of the northern terminus of a public street known as Michigan avenue, on the south side of said main branch, to the point of the southern terminus of another public street, on the north side of said river, known as Rush street, which bridge is known as Rush street bridge. That another of said bridges across said main branch connects the northern terminus of State street with the southern terminus of North State street, and is known as State street bridge. That another of said bridges across said main branch connects the northern terminus of Clark street with the southern terminus of North Clark street, and is known as Clark street bridge, and that another of said bridges across said main branch connects the northern terminus of Fifth avenue with the southern terminus of Wells street, and is known as Wells street bridge.

That over and across the said south branch the said city has likewise constructed and now maintains a bridge connecting the western terminus of Lake street with the eastern terminus of West Lake street, and
10 known as Lake street bridge. That another of said bridges connect the western terminus of Randolph street, with the eastern terminus of West Randolph street, and is known as Randolph street bridge. That another of said bridges connect the western terminus of Madison street with the eastern terminus of West Madison street, and is known as Madison street bridge. That another of said bridges connect the western terminus of Adam street with the eastern terminus of West Adam street, and is known as Adam street bridge.

That another of said bridges connect the western terminus of Van Buren street with the eastern terminus of West Van Buren street, and is known as Van Buren street bridge. That another of said bridges connect the western terminus of Harrison street with the eastern terminus of West Harrison street, and is known as Harrison street bridge.

That there are many other such bridges, to wit: Ten (10) or fifteen (15), more or less, so built by said city over and across said south branch and the south fork of the south branch between said Harrison street bridge and the southern limits of said city, and also many others over and across said north branch within the limits of said city.

Your orator further shows that said bridges are what are termed
11 and known as draw-bridges, being so arranged as to be read'ly

opened in order to permit vessels to pass and repass while navigating said river; that they are constructed in such manner that the center of each of said bridges is supported by a pier erected in the center of the channel of said river, the said bridges resting upon turn-tables or pivots, or said piers, upon which they are easily swung from the center so as to open a draw and leave an unobstructed channel upon each side of said piers.

That the said draws or channels on each side of the respective piers upon which the said bridges are supported, which are known as Rush street, State street, Clark street, and Wells street bridges across said main branch of said river, and of said Lake street, Randolph street, and Madison street bridges across said south branch of said river are of sufficient width to permit vessels to pass and repass without material obstruction or delay when said bridges are not closed so as to permit such passage and repassage.

But owing to the width of the said south branch and the south fork of the south branch of the Chicago River and the existence of said piers in the center of the channel thereof, the most of the draws or channels upon each side of said piers are not of sufficient width to permit a free and safe passage or repassage of very many of the larger class of vessels navi-
12 gating said branch through such draws or channels; that several of the largest class of vessels navigating said river are to' wide to pass through said channels at all, and that such is particularly the case with the draws or channels at the said Harrison street bridge and at all other bridges south and southwest of the same over and across the said south branch and the south fork of the south branch.

That the said center piers upon which said bridges rest extend a great distance along the center or thereabouts of the original natural channel of said south branch and the south fork of the south branch, to wit, the distance of from one hundred and thirty feet to a distance of upwards of two hundred feet, more or less; that the said piers are of considerable greater length than the respective bridges which rest thereon, and are permanent obstructions to the free navigation of said branches of said river, particularly that one upon which said Harrison street bridge and all others upon which the bridge farther south and southwest on said branch and said south fork rest.

That in consequence of the existence of said center piers the said river for the entire length of said piers is divided into two narrow channels considerable less in width than was one-half ($\frac{1}{2}$) of the original or natural channel thereof, the said piers being about thirty or forty feet in
13 width, occupy and permanently obstruct that much in width of the center and best navigable portion of said river.

That the said narrow channels thus created extend up and down said river along the respective banks thereof for a much greater distance than the width of the respective public streets connected by said bridges; that the land on the banks of said river and adjacent to said streets so connected by said bridges on each side of said streets and lying opposite that portion of such narrow channel which extends beyond the boundaries of said streets both up and down said river is private property, and is used by private individuals and corporations as and for docks, wharves, lumber, coal, wood and stone yards to a very great extent, and also in many places

to maintain grain elevators, mills, and warehouses upon. That the owners and navigators of many of the vessels navigating said river long have been, and of right were and still are, accustomed to discharge and take on freight at such docks, wharves, lumber, coal, wood and stone yards, grain elevators, mills, and warehouses so used and so upon the said land lying adjacent to said street; that such vessels, while so discharging and taking on freight thereat, necessarily occupy and do occupy a portion of said narrow channels, and while so occupying the same a very large number of the vessels navigating said river are unable to pass through the remaining portion of such channels, when were it not for the existence of such piers they could safely and easily pass and repass.

That at said Harrison street bridge the navigation of said south branch is so obstructed by the pier upon which said bridge rests that no two ordinary sized vessels navigating said river can pass each other for a long distance, to wit, the entire length of the pier on which said bridge rests, to wit, over one hundred and twenty (120) feet.

Your orator further shows that the said defendant, the said City of Chicago, by and through its officers, agents, and employés, closes, or causes to be closed, all the said bridges at the hour of six (6) o'clock in the morning of each day and keeps or causes the same to be kept closed for the space of one hour, and also closes, or causes the same to be closed, at the hour of half past five in the afternoon of each day, and to remain closed for a like space of time, to wit, for one (1) hour.

That the common council of said city has recently passed an ordinance, which remains in full force and effect in said city, whereby all bridges within said city are required to be kept closed for and during the said two hours aforesaid in each and every day, a copy of which said ordinance is hereunto annexed and marked "Exhibit A," and made a part of this bill.

That the said common council of said city heretofore passed another ordinance, which is likewise in full force in said city, regulating the opening and closing of said bridges between the hours of seven (7) o'clock in the morning and half past five o'clock in the afternoon of each day, by the terms of which no bridge is permitted to be and remain open for the passage of vessels for longer than ten (10) minutes at any one time before being closed as against the further passage of vessels, as will be seen by reference to said ordinance, a copy of which is hereto annexed and marked "Exhibit B," and also made a part of this bill.

Your orator further shows that said city for some time past has been, and still is, enforcing, or causing to be substantially enforced, each of the said ordinances, and believes such enforcement is, and has been, in accordance with the strict letter of the said ordinances.

Your orator further shows that it has made, or caused to be made, (28) twenty-eight round trips, or thereabouts, with each of its said propellors thus far during the season of 1881, between Escanaba aforesaid and the said docks of the said Union Iron and Steel Company, and has delivered twenty-eight (28) cargoes of such iron ore to said company from each of said propellors.

That in so making said round trips and transporting said cargoes of ore to said company, the said propellors pass from said Lake Michigan into the said main branch of the Chicago River to the junction of the said

north and south branches, thence along said south branch, first in a southerly and thence in a southwesterly direction, to said docks, at or near the places where the south fork of said south branch crosses Archer avenue and Thirty-second (32nd) street in said city.

That in so doing said propellors must, within the corporate limits of said city, pass eighteen of the said bridges hereinbefore described, and also five others, known as railroad bridges, owned and operated by certain railroad companies.

17 Your orator further shows that neither of its said propellors or any other vessel navigating said river can pass either of said bridges when the same are closed, except certain steam-tugs engaged in the business of towing other vessels; and that some of said bridges are not constructed of sufficient hight to allow such tugs to pass under them; that by the closing of said bridges by said city as aforesaid the free navigation of said river is totally obstructed during the time said bridges are so kept closed. That your orator in navigating said river with its said propellors as aforesaid has been and is almost constantly greatly hindered and subjected to great and unreasonable delays of its said propellors, whereby it has suffered great damage; that it has the right to carry on its said business and to transport freight upon said river to points of destination in the interior of said city, and particularly to the said docks of the said Union Iron and Steel Company without hindrance or obstruction on the part of said city, and that said city has violated said right, thereby causing great damage to your orator.

18 Your orator further shows that its said propellors could without the aid or assistance of any steam-tug or towing vessel navigate said river from said Lake Michigan to the said docks of said Union Iron and Steel Company were it not for the obstructions to such navigation, caused by said defendant as aforesaid; that it can now without such aid or assistance, safely navigate said propellors past all the said bridges across the said main branch when said bridges are not kept closed by said city, and can with tolerable safety so navigate the same past two or three of the first bridges met with on said south branch when not so closed, but that in passing the said Harrison street bridge and all other bridges between there and said docks it is absolutely unsafe to attempt to navigate the said propellors without the aid and assistance of a steam-tug or towing vessel.

And your orator shows that it has invariable employed a steam-tug or towing vessel to tow each of said propellors on each of said twenty-eight (28) trips, at an expense of seventy (70) dollars for each of said trips, which said sum is reasonable and the usual price paid for such towing; that the aggregate expense of such towing during said season of 1881 amounts to over fifty-eight hundred (5,800.00) dollars, which your orator has thus been subjected to, caused, as your orator is informed and believes, by unlawful obstructions to the free navigation of said south branch

19 and the south fork of said south branch by the said defendant, the City of Chicago.

Your orator further shows that the closing of the said bridges by said city, as aforesaid, does and will hinder and prevent the passage of citizens along said river and said branches thereof, with their steamboats, propellors, and sail-vessels as they have heretofore been accustomed to do, and will greatly obstruct the free navigation of the same.

That such closing of said bridges does and will continue to interrupt, hinder, and disturb the citizens of the said State of Illinois and Michigan, as well as of other States, in their lawful use and enjoyment of the said river and its said branches as a common highway, and will greatly increase the difficulty and expense of navigating the same, as they have been accustomed to do, and have a right to do, and will interrupt, diminish, and greatly disturb the trade, commerce, and business of the citizens of said States of Illinois and Michigan over and upon said river and said branches, as your orator is informed and believes to the great damage and common nuisances of the citizens and others of said States of Illinois and Michigan as well as of other citizens of the United States, and to their irreparable injury, and the said defendant, the said City of Chicago, ought to be perpetually enjoined from so closing said bridges, or any, or either of them, to the ob-
20 struction of such navigation.

Your orator further shows that the said pier upon which the said Harrison street bridge rests as well as the piers upon which many other bridges across said north and south branches and the south fork of said south branch rest, together with the said bridges resting thereon, even when opened for the passage of vessels, are permanent and material obstructions to the free and unobstructed navigation of said branches which the citizens of said States of Illinois and Michigan, as well as those of other States, are entitled to and have a right to exercise and enjoy, as your orator is informed and believes, and that said center piers and the bridges thereon supported, do, without said bridges being closed at all, interrupt, diminish, and greatly disturb the trade, commerce, and business of said citizens over and upon said river and said branches, and in connection therewith over and upon said Lake Michigan, as your orator is informed and believes, to the great damage and common nuisance of the said citizens and to their irreparable injury.

That as your orator is informed and believes said city has so caused and continue, said obstructions and each of them without any lawful right or authority so to do and in utter violation of the rights of said citizens and your orator.

21 For as much, therefore, as your orator is without remedy in the premises except in a court of equity, and to the end that the said City of Chicago, which is made a party defendant to this bill, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived, and that upon a final hearing hereof, this court will order, adjudge, and decree that said bridges and each and every one thereof, so erected across said Chicago River and across the said north and south branches, and the south fork of said south branch, when so closed and kept closed as aforesaid, and for the time aforesaid, or for any unreasonable length of time constitute material obstructions to the navigation of said river and the said branches thereof, and that each of the said bridges so closed is a nuisance to the citizens of the said States of Illinois and Michigan, as well as of other States, and particularly to your orator, and that the same are so closed in violation of law, and that the said ordinances of said city so requiring the closing of said bridges be declared and decreed to be illegal and void, and also that the said Harrison street bridge and the other bridges south and southwest thereof across said south branch and the south fork of said south branch and the piers whereon the

same rest, and all material used therein which injures and obstructs
22 the free navigation of said south branch and the south fork of said south branch, are to the said citizens, and particularly to your orator, nuisances, and that all the said nuisances be abated and removed.

And that said City of Chicago may be decreed to open said bridges upon the approach of vessels desiring to pass the same, and to keep the same open for such time and in such manner as not to obstruct the free navigation of said Chicago River and said north and south branches, and the south fork of said south branch thereof.

And that the said City of Chicago, and its officers, agents, and servants, may be restrained by an order and injunction of this honorable court from closing the said bridges across the said Chicago River and the said north and south branches and the south fork of said south branch of said river, so as to obstruct the free navigation thereof, and be decreed to open said bridges when closed at such time and in such manner as shall be necessary so as not to obstruct such navigation, and that your orator may have such other and further relief in the premises as equity may require and to your honors shall seem meet.

May it please your honors to grant the writ of summons in chancery, directed to the marshal of said northern district, commanding him that he summon the said defendant, the City of Chicago, to appear be-
23 fore the said court on the first day of the next December term thereof, to be held at the United States court-rooms in the custom-house building, in the city of Chicago, in said northern district of Illinois, then and there to answer this bill.

ESCANABA LAKE MICHIGAN TRANSPORTATION CO.,
By IRA H. OWEN, *Sup't.*

COOK & UPTON,
Sols. for Complainant.
HOMER COOK,
Of Council.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Ira H. Owen, being duly sworn, deposeth and saith, that he is the treasurer and superintendent of the complainant, The Escanaba and Lake Michigan Transportation Company, in the foregoing bill named, and has heard the same read and knows the contents thereof.

That the said bill is true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those he believes it to be true.

IRA H. OWEN.

Subscribed and sworn to before me this 28th day of November, A. D. 1881.

[SEAL.] EDWARD L. UPTON,
Notary Public.

24 EXHIBIT A.

"Be it ordained by the city council of the city of Chicago, as follows:

* * * * * * *

"ARTICLE 8.—BRIDGES.

* * * * * * *

"SEC. 984. Between the hours of six and seven o'clock in the morning and half-past six o'clock in the evening, Sundays excepted, it shall be unlawful to open any bridge within the city of Chicago."

25 EXHIBIT B.

"Be it ordained by the city council of the city of Chicago as follows:"

* * * * * * *

"ARTICLE 8.—BRIDGES.

* * * * * * *

"SEC. 985. During the hours between seven o'clock in the morning and half past five o'clock in the evening it shall be unlawful to keep open any bridge within the city of Chicago for the purpose of permitting vessels or other crafts to pass through the same for a longer period at any one time than ten minutes, at the expiration of which period it shall be the duty of the bridge tender or other person in charge of the bridge to display the proper signal, and immediately close the same, and keep it closed for fully ten minutes for such persons, teams, or vehicles as may be in waiting to pass over, if so much time shall be required; when the said bridge shall again be opened (if necessary for vessels to pass) for
26 a like period, and so on alternately (if necessary) during the hours last aforesaid; and in every instance where any such bridge shall be open for the passage of any vessel, vessels, or other craft, and closed before the expiration of ten minutes from the time of opening, said bridge shall then in every such case remain closed for fully ten minutes, if necessary, in order to allow all persons, teams, and vehicles in waiting to pass over said bridge."

(Endorsed:) Filed Nov. 28, 1881. W. H. Bradley, cl'k.

27 On the same day, to wit, on the twenty-eighth day of November, A. D. 1881, there issued out of said clerk's office a writ of subpœna in said entitled cause, which said writ, together with the return of the marshal thereto attached, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the City of Chicago, a municipal corporation, &c., greeting:

We command you that you appear before our judges of our circuit court

of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of January next, to answer the bill of complaint of the Escanaba & Lake Michigan Transportation Company, a foreign corporation, &c., this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or there-
28 after be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 28th day of November, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the 106th.

[SEAL.] W. H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendant is notified that unless it shall enter its appearance in the clerk's office of said court at Chicago aforesaid on or before the day to which the above writ is returnable the complainant's bill will be taken against it as confessed, and a decree entered accordingly.

W. H. BRADLEY, *Clerk.*

Special deputy's return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, George N. Jones my true and lawful deputy to
29 execute the annexed writ, Escanaba and Lake Michigan Transportation Co. vs. The City of Chicago, a municipal corporation, &c., and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, upon The City of Chicago, a municipal corporation, &c., therein named, by delivering a true copy of the same to Carter H. Harrison, mayor of said city of Chicago therein named, on the 29th day of November, A. D. 1881.

A. M. JONES,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

George N. Jones, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense
30 returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 29th day of November, A. D. 1881.

[SEAL.] SAMUEL C. HAYES,
Notary Public.

(Endorsed:) Filed Dec. 14, A. D. 1881. W. H. Bradley, clerk.

Afterwards, to wit, on the third day of January, A. D. 1882, came the defendant, by its solicitor, and filed in said clerk's office its appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

Appearance.

In the circuit court of U. S. for the northern district of Illinois.

CITY OF CHICAGO
ads.
THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION CO. } In chancery.

I do hereby enter my appearance for the defendant in the above-entitled cause.

Chicago, December 31, 1881.

31 JULIUS S. GRINNELL,
Sol'r for Def't.

FRANCIS ADAMS,
Of Counsel.

(Endorsed:) Filed Jan. 3, 1882. Wm. H. Bradley, clerk.

Afterwards, to wit, on the third day of February, A. D. 1882, came the defendant, by its solicitor, and filed in said clerk's office its answer to the bill of complaint in said entitled cause; which said answer is in the words and figures following, to wit:

32 *Answer.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO. } In chancery.

Answer of the City of Chicago, the defendant, to the bill of complaint of the Escanaba and Lake Michigan Transportation Company, the complainant.

This defendant, now and at all times hereafter saving to itself all man-

ner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is or are material or necessary for it to make answer unto, answering, says:

That it admits that the main branch of the Chicago River is navigable and leads into Lake Michigan, but denies that the same is a public highway; it admits that the same flows in the manner described in said
33 bill, and that the City of Chicago has been built and established as described in said bill.

This defendant further denies that said south branch of the Chicago River and the south fork of said south branch were or are navigable from the junction of the north and south branches as far south as the docks of said Union Steel and Iron Company, except as hereinafter stated.

This defendant admits the construction and maintenance along the main river and the south branch thereof of numerous docks, wharves, yards, elevators, branch railroad tracks, etc., used as stated in said bill.

It further admits that trade and commerce is carried on between the City of Chicago and the ports as alleged by said complainant.

This defendant has no knowledge concerning the ownership by complainant of the propellers as alleged, nor of their burden, nor of their employment, nor of the alleged contract of complainant with said Union Iron and Steel Company, and can form no belief concerning the same.

This defendant, further answering, admits that it has constructed and now maintains bridges across the main river and the south branch thereof and the south fork of said south branch at the termini of the public streets named in said bill and at the termini of certain other public streets between said Harrison street and the docks of said Union Iron and Steel Company. It further admits that said bridges are draw-bridges, so arranged as to be readily opened to permit vessels to pass and repass; that most of said bridges were constructed so that the centre of the same is supported by a pier in the centre of the channel of said river, and that said bridges can be swung so as to leave an unobstructed channel upon each side. It further admits that Rush street, State street, Clark street, Wells street, Lake street, Randolph street, and Madison street bridges are so constructed as to offer no material obstruction, when open, to vessels passing and repassing.

This defendant further admits that there are now in force the ordinances in said bill mentioned. It further admits that said ordinances and each of them are duly enforced by this defendant, its officers, agents, and employees.

This defendant is ignorant of the number of trips made by the propellors of complainant, but admits that said propellors take the route alleged in said bill, and that they are obliged to pass eighteen of the
34 bridges erected by the defendant, and five bridges erected and operated by certain railroad companies.

It further admits that said propellors are unable to pass said bridges when the same are closed.

This defendant, for further answer unto said bill, shows unto your honors that it is a municipal corporation of the State of Illinois, existing under and by virtue of the statutes of said State, and deriving its powers therefrom; that the said Chicago River and all its branches and forks

lie wholly within the said State of Illinois, and are under the control of said State; that said State has full and complete power over said stream, such power not being restricted by any affirmative legislation on the part of the Congress of the United States; that the State of Illinois has delegated to this defendant the control and regulation of said river, and this defendant says that each and all of the acts complained of in said bill, both the erection and maintainance of said bridges, with piers in the centre of the stream, and the regulation by ordinance of the times for opening and closing the same, were and are authorized by the State of Illinois by public statutes then and now in force.

Protesting that it is a complete answer to each and all of the allegations of said bill of complaint that the Chicago River is wholly within the jurisdiction of the State of Illinois, and that this defendant was and is authorized by said State to do all the acts complained of against it by the complainant herein, this defendant answers further and shows unto this honorable court that in exercising the powers over said river conferred upon it by the State of Illinois it has in every case consulted as well the interests of commerce and of navigation as of the citizens of the city of Chicago.

1. As to the ordinances admitted by this defendant to have been duly passed and now in force this defendant shows as follows:

That there reside within the corporate limits of this defendant a population largely in excess of five hundred thousand (500,000), and within the county of Cook a population exceeding six hundred thousand (600,000); that the city of Chicago, bounded on the east by Lake Michigan, has three so-called divisions; the south division, bounded on the east by Lake Michigan, on the north by the main Chicago River and the south branch thereof, and on the west by said south branch; the north division, bounded on the east by the lake, south by the main river, and west by the north branch thereof, and the west division, bounded on the east
35 by said north and south branches and south by said south branch; that said south division contains the vast majority of the offices, stores, warehouses, public buildings, and courts, and constitutes the main business portion of the city; that most of the citizens doing business in said south division reside in said west and north divisions, and the adjacent territory outside of the corporate limits, and in Cook and the adjacent counties; that such citizens, in order to pass from one division of the city to another, and more particularly in going to and fro from their houses to their places of business, are compelled to cross said river or its branches; that the amount of traffic across said bridges is enormous; that this defendant, in order to facilitate intercourse between said divisions, has built two tunnels under said river, one connecting the north and south divisions at La Salle street, and one connecting the west and south divisions at Washington street, but said tunnels have proved wholly inadequate to relieve, to any material extent, the amount of travel and traffic across said bridges; that the amount of such travel and traffic is greatest, during the week days, between the hours of six and sevenn o'clock in the morning and half past five and half past six o'clock in the evening, more particularly by reason of citizens going to their places of business in the morning and returning to their homes in the evening.

This defendant, to show more fully the amount and character of the

traffic across said bridges, the relative amount of navigation in said river, the average number detained by the opening of the bridges and time detained, hereto annexes the result of observations made at Clark street bridge and Madison street bridge, marked Exhibit A, and makes the same a part of this answer.

This defendant further says that the United States mail is transported across the Chicago River and its branches, and is subject to the same delay suffered by the citizens of this defendant from the opening of bridges.

This defendant, further answering, submits that in view of the above-mentioned facts, the said ordinances and each of them are reasonable and proper, and their enforcement required.

This defendant further says, that the same impose no great hardship upon complainant, or upon the general navigation of the river, as the delays caused by the so-called "ten minute" ordinance are but trifling, and the navigators of said river can with no great difficulty arrange, and have heretofore arranged, to enter or leave the river at a time other than the two hours of 6 to 7 a. m. and 5.30 to 6.30 p. m.; and
36 this defendant submits that whatever inconvenience or delay to navigation may be caused by the enforcement of said ordinances is but slight when compared with the injury and damage which would be caused to the citizens of this community were the same not enforced.

2. As to the bridges and the piers on which the same are constructed, from Harrison street to the docks of the Union Iron and Steel Company, which are alleged by complainant to be nuisances, and which it asks to have removed, this defendant shows that it was authorized by law to construct the same, and that the same were and are lawful structures.

This defendant, further answering, denies that the same are nuisances, that they, or either of them, materially obstruct the navigation of said stream. It further denies that by said piers the river is divided into two channels, each considerably less than one-half ($\frac{1}{2}$) of the original or natural channel thereof; but says that the two channels, on each side of the piers above mentioned, are together of greater width than was the original or natural channel of the river; that the said river, between the points above named, has, from time to time, since the organization of the city of Chicago, been deepened and widened by and under the authority of this defendant, so that the distance from each abutment of each of said bridges to the pier on which the bridge rests is greater than was one-half ($\frac{1}{2}$) of the original and natural channel of the river at such point. So far from obstructing or impeding the navigability of the river, the city of Chicago has from its foundation done, and still continues to do, everything possible to render the same more navigable.

This defendant further says that the bridge at Harrison street, which the complainant more particularly specifies, was erected by this defend' on the west side of the south branch, immediately adjoining the west shore, leaving a space of some 70 or 80 feet as a channel; that afterwards this defendant, to increase the navigability of the river at that point, condemned and excavated at a great expense a portion of said west shore, adjoining said bridge, and has thus formed another channel on the west side of said bridge some 75 feet wide, and has, instead of obstructing the channel at that point, nearly doubled it in width.

This defendant admits that the piers on which said bridges rest are of greater length than the bridges themselves, and says that it is necessary that they should be so constructed in order to protect the bridges from damage and destruction from vessels navigating up and down the river.

This defendant further denies that it is necessary for complainant to employ a steam-tug for its propellers on account of the bridges erected
37 by this defendant, from Harrison street south, but says that if it were necessary for said complainant to do so, on account of said bridges, it would be necessary so to do, were all of this defendant's bridges removed and there still remained the bridges erected by the railroad companies, as alleged in said bill of complaint.

This defendant, further answering, says that the south branch of the Chicago River and the south fork of said south branch between Harrison street and the docks of the Union Iron and Steel Company were not naturally a navigable stream, and are not a public highway, and especially alleges that said stream between said points could not, in its natural state, have been navigated by the propellers of said complainant, or either of them; that the stream between said points has been heretofore not only widened, but has also been deepened by this defendant, and it is due to the efforts of this defendant alone that said south branch and south fork thereof can now be navigated by any of the propellers aforesaid.

This defendant further submits that the complainant cannot be heard to complain that said south branch and south fork thereof are obstructed by this defendant, when it is through the acts of this defendant alone that the same were rendered navigable for the propellers owned by the complainant herein.

And this defendant, further answering, denies that the complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if it had pleaded or demurred to the said bill of complaint, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

[CORPORATE SEAL.] CARTER H. HARRISON,
Mayor of the City of Chicago.

Attest: P. J. HOWARD, *City Clerk.*

F. S. WINSTON, JR., *Solicitor.*

FRANCIS ADAMS,
JULIUS S. GRINNELL,
Of Counsel.

NOTE.—Exhibit A appears in defendant's testimony.

(Endorsed:) Filed Feb. 3, 1882. Wm. H. Bradley, clerk.

38 Afterwards, to wit, on the sixteenth day of February, A. D. 1882, came the complainant by its solicitors and filed in said clerk's office its replication to the answer of said defendant in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

United States circuit court, northern district of Illinois, ss:

In the United States circuit court.

THE ESCANABA AND LAKE MICHIGAN TRANSportation Company
vs.
THE CITY OF CHICAGO. } In chancery.

The replication of the Escanaba and Lake Michigan Transportation Company, complainant, to the answer of The City of Chicago.

This repliant, saving and reserving to itself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant for replication thereunto, say that it will aver, maintain, and
39 prove its bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual, in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays, as in and by its said bill it has already prayed.

COOK & UPTON,
Solicitors for Complainant.

(Endorsed:) Filed this 16th day of February, A. D. 1882. W. H. Bradley, clerk.

40 Afterwards, to wit, on the twenty-fifth day of February, A. D. 1882, in the December term, A. D. 1881, of said court, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ESCANABA AND LAKE MICHIGAN TRANSPORTAtion Company
vs.
THE CITY OF CHICAGO. } In chancery.

On motion of complainant's solicitors, Messrs. Cook & Upton, it is ordered that this cause be referred to Henry W. Bishop, esq., a master in chancery of this court, to take proofs herein and to report the same to the court.

Afterwards, to wit, on the twenty-second day of June, in the adjourned

May term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause before Hon. John M. Harlan, one of the justices of the Supreme Court, and Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

41 *Order.*

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO. } In chancery.

This cause being set down for hearing this day upon the bill, answer, replication, proofs, and exhibits on file herein, and the same now coming on to be heard, and after hearing a part of the arguments of counsel the hour of adjournment having arrived the further hearing of this cause is postponed until to-morrow morning.

Afterwards, to wit, on the twenty-third of June, in the adjourned May term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court, and Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY
42 *vs.*
THE CITY OF CHICAGO. } In chancery.

This cause coming on again to be heard in pursuance of the order of postponement entered herein on yesterday, and the arguments of counsel being now resumed and concluded, the court, upon the hearing not being sufficiently advised in the premises, takes time to consider.

43 Afterwards, to wit, on the seventh day of July, in the July term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court, is the following entry, to wit:

Order.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO. } In chancery.

Now come again the parties, by their solicitors, and the court, having considered and being fully advised upon the matters at issue herein, finds the equities with the defendant. It is thereupon considered, adjudged, and decreed that the bill herein be and the same is hereby dismissed, and

that the defendant have and recover of the complainant its costs to be taxed herein, amounting to the sum of dollars and cents, and that it have execution therefor.

44 *Certificate of evidence.*

In the circuit court of the United States for the northern district of Illinois.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO. } In chancery.

Be it remembered that on the hearing of the above-entitled cause, the complainant, to maintain the issues on its part, introduced and read in evidence the depositions of Ira H. Owen, Albert E. Goodrich, R. W. Hayes, Thomas G. Butlin, Thomas Johnson, Stephen Green, Peter Peterson, John Sweeney, John O'Grady, John Keelin, Fay Nyman, James McElwee, Charles N. Myers, William Harman, J. A. Crawford, Andrew Green, Andrew Wilson, James L. Higgie, George W. Hotchkiss, Thomas L. Parker, Walter G. Kircheral, Robert Clidesdale, Joseph C. Perrett, John B. Warren, George E. Merritt, J. G. Lydecker, Albert T. Spencer.

45 *Deposition of Ira H. Owen.*

In the circuit court of the United States for the northern district of Illinois.

ESCANABA & LAKE MICHIGAN TRANSPORTATION COMPANY, complainant,
vs.
CITY OF CHICAGO ET AL., DEFENDANTS. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Monday, the 13th day of March, A. D. 1882; present, Mr. Cook for complainant, Mr. Winston for defendant.

IRA H. OWEN, a witness on behalf of the complainant, being first duly sworn, was called and examined-in-chief by Mr. Cook, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

A. My name is Ira H. Owen; age, 59 years; residence, Oak Park, Cook County.

Q. What is your occupation?

A. My present occupation is manager of the Escanaba & Lake Michigan Transportation Company.

46 Q. What experience, if any, have you had in sailing vessels, and where?

A. I commenced sailing on the lakes in 1835, in the fall, and I followed it for an occupation until the spring of 1872, at which time I took the management of this company.

Q. What has been your business since that time?

A. Managing the Escanaba & Lake Michigan Transportation Company, composed of steam vessels and tow barges, with headquarters here in Chicago. I have had the immediate management, not the nominal management, but immediate management of the company. It is organized under the laws of Michigan, and vessels are registered at Port Huron, Michigan; the principal stockholders live in that State, along the river St. Clair and in Detroit.

Q. State what acquaintance you have with the Chicago River and its branches.

A. I commenced running up the south branch with the schooner I was captain of in the spring of 1845. I run up as far as the entrance of what is called now the south fork. I made 12 trips in the season of 1845, loaded with stone 12 times for St. Joseph, Michigan. There were no bridges then excepting three or four floating bridges, no swinging bridges.

47 Q. Are you acquainted with the location of the bridges across the Chicago River and its branches?

A. Yes. I have passed through at sundry times all the bridges from Archer avenue along down to Rush street bridge, on the south fork, and from Clybourne ave. bridge to the junction of the main river with the north branch; there are 23 bridges from the mouth of the river, counting the railroad bridges, to 33d street, to the private bridge belonging to the Wahl Bros., between Archer ave. and 33d street.

Q. What business has the Escanaba & Lake Michigan Transportation Company, the complainant in this suit, been engaged in during the last two years?

A. In 1879 and 1880 they were in the grain trade between Chicago and Buffalo; in the fall of 1880 they made a contract with the Iron and Steel Company, of Chicago, to transport from 100 to 175 thousand tons of ore a year, for five years, commencing at the opening of navigation, 1881. In pursuance of that they commenced transporting ore on the 1st of May, or thereabouts, 1881, and carried something like 130,000 tons last year to their works, situated at Archer ave. and 33d street, on the south branch. They have three propellers, and charter numerous other vessels to help them do the business.

48 Q. How many cargoes of ore did the company carry from the commencement of navigation, 1881?

A. I can tell you the number they delivered with their own boats; I will give it by boats. The propeller Escanaba delivered 25 cargoes; the propeller Argonaut delivered 25 cargoes; the propeller Interocean delivered 26 cargoes. They chartered numerous vessels, sometimes had six under charter carrying for them; in some of the heavy contracts we have to employ the largest sized propellers we can to get up that branch; couldn't do it with small boats; would have to have so many of them it would block us all the time.

Q. Is that company able to navigate propellers up to the dock of the Iron & Steel Company without the aid of tug vessels?

A. Not after we got above Randolph street bridge, say Randolph or Van Buren; we can navigate very well up to Van Buren street bridge without a tow; above that the river is narrow, the bridges having a cen-

tre pier, obstructing the centre of navigation, which makes it unsafe to attempt to get through the narrow passages witht he boats without a tug; in fact, it could not safely be done with the vessels of that class we have to employ for that trade.

49 Q. What is the expense of towing each trip?

A. It costs $66 both ways; $33 for each way.

Q. Do you recollect the fact that some time in July, 1881, the City of Chicago commenced to keep all bridges closed for an hour in the morning and an hour in the evening?

A. Yes; I know that to be the fact. My office is located right at the end of Wells street bridge. I know when they commenced to close them for an hour in the morning and an hour in the evening.

Q. State the date, if you recollect it.

A. I can't tell the date; the ordinance was passed early in the season. I think it commenced to operate in July.

Q. You can state whether or not the closing of the bridges for an hour in the morning, between six and seven o'clock, and also for an hour in the evening, between half past five and half past six, is any material obstruction to the navigation of the river. If so, explain why, and to what extent.

A. It is a material obstruction to navigation for several reasons. One of the principal reasons is the evening obstruction seems to work the most injury from this fact: My vessels leave the iron ore dock and unload to-day, say at 5 o'clock, which occurs more than at any other hour of the

50 day; we are unloading between 4 and 6 o'clock more than any other time on account of not taking quite two hours to finish; we start down at half past five and the bridges are closed on us. In the fall, after about the 1st of September, at half past six it gets dark, and there is a dense smoke on the river after dusk, which makes it difficult to navigate that branch, and makes it so dangerous, and it takes two or three hours longer to take a boat from there down to the piers than if we had daylight. We can come down in an hour from the dock to the bridge at Rush street by daylight, while it takes three or four hours to come down in such a night as I have spoken of—a dark night. We had a great many of them this fall. Besides, it enhances the liability to do damage in coming down through narrow, intricate channels after dark tenfold; besides the delay of the vessel, it makes it very much more dangerous. We can get down the river very well in daylight with the big boats, even if the river is crowded, but when we come to have dark, the bridges being narrow, if we should have to lay all night that would be another damage, because we are running on short trips; sometimes are only

51 gone 44 hours in making a trip. We leave here and go to Escanaba and load and get back in 44 hours. If we lose 12 hours it is a quarter of the trip. Our trips are worth to us a thousand dollars a trip at the gross, and it costs us as much to lay up as if we were running. That is the principal reason. Another reason is, we come here in the morning; we cannot regulate the time of getting here; we leave Escanaba when we are loaded, and we get here at the time when we are fetched here by the wind. We cannot regulate it at all. We may have winds to hurry us along or retard us, and we get here when we can. The time for unloading the boats is somewhere about 16 hours. We come in at the mouth

of the river in the morning and lose an hour. That hour is likely to delay us an hour in getting to the dock and in getting started, and if any mishap occurs we have to lay over another night and finish in the morning. That has been the case several times, when we have laid over for an hour's work in the morning, and that makes a difference of 12 hours in the running.

Those are the principal damages our company have to contend with.

52 We have a bill passed in of the captain amounting to 30 odd hours on account of our coming in so often, making so many trips. We can easily trace the losing of a trip by losing an hour. We are detained up their an hour by that means, and we lose three hours in getting down the river, and we get away four hours late from the coal dock at the mouth of the river, which has happened several times. In the fall of the year the gales are sometimes so strong no propeller can go against them, and if we had that four hours lost we would make the trip. It is a material loss to us. What occurs with us is liable to occur with everybody else that runs up that branch. I believe that is about the sum and substance of the detention.

Q. State whether or not it is a fact that any of your propellers were actually detained there during the hour.

A. Yes, I have stated so; three of them lost about thirty hours in the aggregate from the shutting of the bridges.

Q. You don't recollect how many times they were detained?

A. Yes, I have a minute of it in my office.

Cross-examination by Mr. ADAMS:

Q. You say you navigated the south branch of the Chicago

53 River up to the south fork in 1845; what sort of a vessel did you navigate then?

A. A schooner that carried 30 cords of stone, a regular schooner, two masted, drawing about 10 feet of water when she was loaded; she was an old-fashioned schooner without any centre board, which makes them draw more water according to the size than our vessels now-a-days. We had 18 inches standing keel, which took the place of the centre board.

IRA H. OWEN.

Redirect examination of IRA H. OWEN:

Q. You may state whether you had any early acquaintance with the condition of the Chicago River, and particularly with reference to the south branch.

A. I came to Chicago in May, 1845, with a schooner loaded with wood from St. Clair River, called the General Harrison; I came to Chicago the 9th of May, and met Captain Napier, who was drowned on the Alpena; he wanted to know if I wanted to charter my vessel for the season. I chartered my vessel to carry 12 loads of stone from the bayou which is now the entrance of the south fork of the south branch. She carried 30 cords of stone, and drew 9½ feet of water loaded. I sailed her up

54 there when the wind was fair, and down when the wind was fair, loaded; when the wind was not fair, I got her to Randolph street bridge, which was a floating bridge, and from there to where we went there was a tow-path, said to have been made by the United States Government to tow their scows.

(Objected to.)

The man that told me said it was what it was for, to tow scows down. Of course I could hitch my horses there and tow the schooner up to the stone quarry, which was just above where the gas-works are, and also tow her down again. The tow-path ran from Randolph street bridge to the stone quarry to the entrance of the south fork of the south branch. The tow-path was a plank over the sloughs; there were several sloughs which were planked over for horses to cross on to tow the scows that were fetching stone. I made the twelve trips of stone during the summer of 1845; the brig Scott made 15 to my knowledge; she was a larger vessel, carried 50 cords of stone or thereabouts, and drew probably 11 feet of water. Vessels in those days drew more water according to their size than now, because they had no centre board. That vessel had 28 inches of standing keel. We had no difficulty in regard to the
55 depth of water or widtl. of channel. The Scott and Harrison met several times and had no difficulty in passing one another. They were about 26 feet beam each. I winded the schooner where we loaded. She was 96 feet long; as near as I can recollect, between 95 and 100 feet, and I winded her when we loaded at the docks; sometimes we would wind before we loaded, and sometimes after, according to which way the wind was; if the wind was down the river when I went, I winded her then; there was no docks and no piles; we made fast to the trees and had long planks to push onto the banks, and wheel the stone on wheelbarrows over. I had no difficulty in entering the Chicago harbor in 1845, coming straight in. The end of the north pier, I should judge, was about 100 feet out into the lake, opposite the Illinois Central R. Elevator is, and the south pier, I should think, ended about where the elevator is now, but we came straight that year to the harbor. I fetched back wood from St. Jo. and took one load up to the lime-kiln; there were two bridges across the river there, both floating bridges; one of them was, I think, at Lake street, and the other at Randolph—either Clark or Dearborn, and one at Randolph street. I ran through one morning with the vessel; the bridge-tender hadn't opened it,
56 and I took the bridge away, and took it up the river about 100 or 200 feet; at that time the bridge-tenders were more afraid of damage; they would have to pay the vessels then; they didn't expect vessels to pay for the bridges, and the tender came to me and asked me if it damaged my vessel; I told him it didn't; he said he was glad, for they would make him pay it individually.

Q. State what the condition of the banks of the river was with reference to being flat or shallow.

A. The banks were pretty flat; you could not very well stick a schooner on the banks; of course they sloped down some; there was a bend just above 22d street; but they were pretty flat, but we never had any trouble; the water was pretty deep. I don't think there was any place in the river, from Rush street ferry to where we went, where there was not 16 feet in the channel of the river. I measured it often, not particularly to see how much exactly there was, but for other purposes; shoved down oars. The men with a 16-foot oar would stick it down and would not touch bottom, in trying to sheer off the boat on the bank of the river, in order to push the boat up to the shore.

Q. State whether or not the south branch was then apparently
57 in its natural condition.

A. Yes; I should say it was. There was no docks from Randolph street bridge up to speak of. It seems to me there was a little channel somewhere between Lake street and Van Buren or Twelfth, and the river was in its natural condition. There was an island where you come to Lake street bridge, called Goose Island, below where Lake street bridge, and there was a channel on the east side with plenty of water, and along down to 1850 there was a packing-house built up the south branch. I ran a propeller up to Hough's packing-house several trips in the fall of 1850, to load with beef; the vessel was 175 feet long; would draw about 10 or 12 feet when loaded. We went up to the canal lock to wind, ran down into the lock, backed the stern around, and then up to the south fork.

(Objected to as not responsive.)

Q. State, if you know, the point which has been spoken of by some of the witnesses as Mud Lake.

A. Yes.

Q. Where is that point now?

A. As you go up the river you come to the canal lock; Mud Lake is off to the right, while the south fork of the south branch is to the left. Mud lake has got slips where vessels go to load lumber; that is the lumber district.

58 Q. Is it as far up the south branch as the mouth of the south fork of the south branch?

A. Yes; when you go to the right before you get to it, it is a longer distance to go up to the slips than to go up the south fork where our boats go.

Q. Is that the locality known as Bridgeport?

A. Yes.

Q. You may explain the difficulty, if there is any, in passing the bridges on the south branch, what bridges, and what the difficulty is.

A. Commencing at Harrison street, the boats of our line experience difficulty in getting through, there being only one channel for the boats to go through loaded—the east channel. The Lemont Stone Dock Company have a dock up to the bridge in the east side, and it is usually filled with canal boats narrowing the channel down, the bridge pier being only 58 feet wide; we have to sheer over so close to the protection of the bridge that frequently we strike the boat against spring piles, and that gives her a rebound which cannot be avoided and sheers her across, and we have done damage to the approach to the bridge to a certain extent, which was unavoidable on account of the narrowness of the draw and the location of the creek coming into the river and the boats lying right in the draw of the bridge. It made us a great deal of expense, and the city has claimed damages to the bridge on account of that; it was not our fault.

59 Also when we got up the river we find a great many bridges in the same way. If there is a big vessel lying in the same shape the canal boats lie at Harrison street, we could not pass until it is moved. We have to have a harbor-master and sometimes are detained half a day. The like thing exists at the Joliet Steel Company's docks; they unload ore in the draw of the Chicago & Alton R. R. bridge.

(Objected to.)

Their vessels being large vessels, 36 feet beam, and our vessels are about the same width, and the distance between the lower point of the protection and dock being 69 feet, two 36-foot vessels cannot pass there. We have lost a good deal of time there, several days, that is on account of the pier not running parallel with the dock.

Q. Any difficulty at another bridge?

A. At Archer avenue bridge we have had a great deal of detention, from the fact there is only one draw of the bridge that could be used, and vessels would lie at the draw and unload, and we could not pass the west draw. I got the privilege from the city or board of public works to dredge it myself; that is, I got an order for the bridge-tender to open the bridge and dredge it, and I got a dredge, but it was light and could not dredge the hard clay, and it is in the same condition still, impassable for vessels of that class. The greatest trouble is at the Chicago & Alton R. R. bridge in detentions and delays.

60

Q. State whether you know the location of the tunnels under the river.

A. Yes.

Q. State whether you have been through them frequently.

A. Great many times.

Q. State whether you ever found them crowded with people passing and repassing so there was any difficulty in getting through.

A. I never saw them crowded at all. I saw at the time shortly after the fire, before all the bridges were in working condition, teams going through each way, and sometimes they would be pretty nearly together, but there was no jam or any stoppage; they moved along all the time, but since they have the bridges I have seen very few in the tunnels.

Q. I will ask you in regard to the foot passageway in the tunnels.

A. I never saw it but what there was plenty of room.

Q. I will ask you whether or not you have any knowledge with reference to the different kinds of draw-bridges across navigable streams, and the manner of working them.

A. Since this case commenced I was in Cleveland, Ohio, and I visited two draw-bridges operated by steam; one of them is 330 feet long, and has a four-track bridge; it has two street-car tracks and two tracks each side of it. I watched the operation of two or three vessels going through, and they were on an average open from 2½ to 3 minutes, that long bridge, 330 feet long. I saw two vessels go through. Then I visited the railroad bridge, which has a 200-foot draw, and all seasons on one side with a double track. I was told by the bridge tender and vessels' captains going through—

61

(Objected to.)

there was no tug in the river that could tow a vessel fast enough to hit the bridge. After they got started they opened it in ten seconds after it is started. It has a double track, and is an iron bridge that they call a bob-tailed bridge; no pier in the middle.

Cross-examination by Mr. WINSTON:

Q. You were never here before 1845?

A. Yes.

Q. What year?
A. I was here in 1842 and 1839.
Q. Did you ever navigate the river?
A. Not further up that Reed's steamboat docks at State street.
Q. Did you go further up than that prior to 1845?
A. Went up to the forks.
Q. Never went up above the forks prior to that?
A. No, sir.
Q. You say there was an island near to where Lake-street bridge is?

62 A. Yes; a little over to the west channel.
Q. How wide was the channel between the island and shore?
A. I don't know as I had no occasion to measure; it was wide enough to let a vessel through.
Q. How wide?
A. 60 or 80 or a 100 feet.
Q. Which was it?
A. I couldn't say; it was wide enough to let *in* any of the boats pass, probably 100 feet. I never measured it; the water was very deep there.
Q. How wide was the island?
A. That I don't know; it was a little island.
Q. About how wide?
A. That I could not say; it was a little mud lump sticking up there.
Q. Do you remember about a channel being dug at Harrison street on the west side of the bridge?
A. No, sir.
Q. You say there was very little travel through the tunnels?
A. I don't believe I ever saw over 20 persons in the foot tunnels. I have driven through the road tunnels when there was considerable many teams, and when I was the only one in them.

IRA H. OWEN.

Subscribed and sworn to before me this 31st day of March, A. D. 1882.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

(Endorsed:) Filed June 22d, '82. Wm. H. Bradley, cl'k.

63 *Deposition of A. E. Goodrich.*

In the circuit court of the United States for the northern district of Illinois.

ESCANABA & LAKE MICHIGAN TRANSPORTATION Co., complainant,
vs.
CITY OF CHICAGO ET AL., DEFENDANTS. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Friday the 3rd of March, A. D. 1882. Present, Mr. Cook, for complainant; Mr. Adams, for defendant.

A. E. GOODRICH, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. COOK and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

A. My name is A. E. Goodrich; 56 years of age; residence, Chicago; transportation business principally.

Q. What has been your occupation through life principally?

64 A. Principally transportation.

Q. Where?

A. On the lakes.

Q. In what business is the Goodrich Transportation Company now engaged?

A. Transporting business, doing what is usually called a local business, confined to Lake Michigan.

Q. Running to and from Chicago?

A. Yes, sir; to different ports on Lake Michigan.

Q. How many and what kinds of vessels does that company run*ning*?

A. We have eleven; five side-wheel boats and six propellers.

Q. State whether or not you personally gave a portion *go* of your time to the business of the company?

A. Yes, sir, I do; most of the time.

Q. State to what extent you now are and have been acquainted with the Chicago River and its various branches and the harbor.

A. I have been running in and out of Chicago regularly since 1844.

Q. You are acquainted with the location and general manner of construction of the various bridges across the river, are you not?

A. Yes, sir.

Q. I will ask you if you are particularly acquainted with the location and construction of the Illinois Central Railroad Bridge, being the bridge nearest the mouth of the river.

65 A. Yes, sir.

Q. Do you know how the centre pier on which that bridge rests is situated?

A. Yes, sir.

Q. You may state whether or not that bridge, together with the piers on which it rests, causes any material obstruction to the navigation of the river; and, if so, explain why.

(Objected to.)

A. It is a very material obstruction to the navigation of the river. The river where the Illinois Central crosses I do not know the exact width, but I think it is about 250 feet wide; they put an abutment in the centre of the river; I think it is something like 200 feet in length; the exact width of that I don't know; I should think from the location of it it was something like 30 feet; I never measured it. On the north side of the river the Peshtigo company owned the ground, except what the Illinois Central Railroad owned for their tracks. The Peshtigo company have a lumber yard there, and there is hardly an hour in the twenty-four they do not have a large barge lying at that dock, either above or below the bridge near to the bridge; if their barge lays there at the dock no what we call fair sized vessel can pass through that draw, the north

66 draw of the bridge, so it throws all the business of the river into

the south draw. Two boats of any reasonable size cannot pass in the south draw, so when one boat is coming down and one boat going up they see each other and have to stop; sometimes both stop; cannot tell which is exactly ahead; the one that goes into the draw first will go through; the other has to wait for that to get through; while that gets through there will be another following that up; sometimes there will be a half a dozen, and the one that is on the other side has to lay there and wait; sometimes wait an hour before they can get through, because they cannot pass together in the draw. The Illinois Central Railroad owns the property on the south side of the draw, and they have a perfect right to allow a boat to their dock, and if they did there would be no passing either in or out of the Chicago River on either side of the dock.

(Objected to as not stating the fact.)

A. The Illinois Central Railroad people have taken all pains to keep their bridge open they possibly could. If they could take their abutment up when they have the bridge open, the middle pier that is in the river, there would be but very little difficulty in going up and down; if
67 the abutment was taken out of the way there would be no difficulty in getting in or out; but whenever the bridge opens the pier is still there, with the bridge on top of it. My boats are frequently detained there for an hour or more getting in and out. Passenger boats sometimes come in with a couple of hundred passengers and wait to get in or out of that bridge. That is not owing to the ordinance, because the Illinois Central have not paid any attention to the ordinance, for they have not closed the bridge, as the ordinance allowed, as they have very little business for the bridge. The Illinois Central Railroad have not closed their bridge, as the ordinance would permit them to do, but Rush street is closed according to the ordinance—the first bridge above the Illinois Central—and the vessels block in there. My dock, where the passenger steamboats land, is below Rush street bridge, but the vessels coming in block in below, because they cannot pass through Rush street bridge during the hour, and we are kept back getting to the dock below Rush street bridge. That jams up everything, forming a jam just as it is in the street; a team stops and everybody stops, and in a few moments it is a jam, and
68 then it is slow work to get out. If there could be a steady flow all the time, or even if slow, it would accomplish a great deal; but the stopping and jam'ing up together of boats coming down and boats going up, that makes these great detentions, confusion, and damage. The damage is much more than people generally contemplate. Take a boat that costs, as many of our boats do, from one hundred to one hundred and fifty thousand dollars; you take the interest on that money, and insurance and depreciation of property, the crew that is under pay, and stop to consider; there would be only seven to eight months every year to navigate in, and shut out all the winter; this property is becoming very undesirable if it is to be blocked up by the river. If Buffalo and Milwaukee should block up and folks be detained the result would be we could not do the business at the present rates; it would not pay expenses, and we would have to abandon the business and go out of it. The damage to the city of Chicago would be great. The city of Chicago owes it' life to the river; it never would have been here if the river had not been here.

69 (Defendant objects to a portion of the foregoing answers as not being responsive to the question).

A. It illy becomes the citizens to disparage the river; the city owes its life and being to the river; if there ever was a portion of the community trampled on and abused it is the navigation of the lake interest; the government has gone and built a harbor and built piers, but will not allow a boat to go alongside of it.

Q. State about how many vessels you ever saw between those two bridges you speak of, the railroad and Rush st. bridges, at any one time.

A. I never counted them. I have frequently seen a dozen there, certainly a dozen, and more too.

Q. You recollect that sometime in the forepart of July last season the city commenced to close the bridges for an hour in the morning and an hour in the evening.

Yes, sir; sometime in July; the first I noticed the ordinance was being obeyed.

Q. State whether or not the enforcing of that ordinance for closing the bridges for an hour in the morning and an hour in the evening constituted any material obstruction to the navigation of the river; and, if so, what?

A. Yes, sir; a very material damage.

Q. State whether or not there is any difficulty in navigating
70 the largest sized vessel that runs on the Chicago River past any of the bridges further up the river.

A. Yes, sir; I have boats running that can't go up the south branch at all.

Q. Why not?

A. On account of the bridges; the draws of the bridges; being so narrow they have been shut out of the river.

Q. Would that be the case if the bridge piers were removed from the centre of the river?

A. There would be no trouble then at all. I have some of my boats shut out of the south branch since Madison street bridge was built; then Randolph street bridge is too narrow, and I don't know how it is above that; never could get up there to find out; the damage has been very serious to me.

Q. I was going to ask if your company would have occasion to run their boats if you could pass the bridges?

A. Yes, sir; we would bring a great deal of freight from Milwaukee to the Pittsburgh and Fort Wayne depot, but we can't bring it because we can't get up there with our larger boats; the boats that would bring that freight, the daily boats between Milwaukee and Chicago can't get up there, and the cost of carting it from the dock to where they can land makes it prohibitory. $50,000 would not make me good. I speak not ex-
71 travagantly when I say that; it would not make us good for the damage we have sustained there during the last fifteen years in that way; simply not taking freight we otherwise would have taken if we could have gone up the river.

(Ojected to as not responsive to any question.)

Q. State whether or not since you have been acquainted with the Chi-

cago River there has been any sand bar across it to any place, and if so, where?

A. There is a sand bar down at the mouth of the river, outside of the end of the pier from the end of the pier south, usually leaving an opening west to the sand bar; we come in and go around the end south of the pier; the north pier being out farthest in the lake the sand drives from the northward and forms a bar south of the north pier.

Q. State whether or not that sand bar has ever been removed to any extent, and if so, by whom?

(Objected to as immaterial.)

A. It was dredged out several times by the United States Government.

Q. How far up from the river, from its present mouth, did you ever know the government doing any dredging?

A. I don't remember of ever seeing a dredge above Rush street
72 bridge; I have seen dredging in the vicinity of Rush street bridge, and from there out to the lake.

Do you know whether or not a draw-bridge can be successfully constructed without having a centre pier?

(Objected to as immaterial.)

A. There is no difficulty about that.

Cross-examination by Mr. ADAMS:

Q. What is the width of your boats?

A. I think the widest one of them, I believe, is 61 feet or about 62 feet.

Q. What is the width of the narrowest?

A. Side-wheel boat. There *is* four that cannot go through the bridges; do you mean the widest of those?

Q. Answer the question. What is the width of the narrowest boat?

A. The narrowest boat we have?

Q. Yes.

A. I think the narrowest one is about 28 feet.

Q. What is the width of the four that cannot go through?

A. About 56 feet.

Q. When did you know of the Government of the United States doing any dredging up the river from the mouth?

A. The government had a dredge down there, but I really can't tell what year, I think in 1844, 1845, 1846, or 1847; along those years.

Q. State the last time you knew of the government doing any dredging in the river, as near as you can?

73 A. You mean inside the piers?

Q. Yes; up from the mouth, in the direction up the river from the mouth.

A. The government made contracts for dredging down at the mouth of the river between the piers; they put out piers and had to dredge out the sand; they dredged out in there, I think; along from 1850 to 1860 they did more or less.

Q. When did you know of the government doing any dredging; say up the river from the Illinois Central Railroad bridge, the last time you ever heard of it?

A. I think the government did dredging there along in 1844, 1845, and 1846.

Q. You were here then?

A. Yes; I went in and out of Chicago, running to Buffalo.

Q. That was between the Illinois Central Railroad bridge and Rush street bridge?

A. Below Rush street bridge.

Q. The last time was 1844, 1845, or 1846?

A. Yes; as near as my recollection is.

Q. Do you know who had the contract for it?

A. No, sir; the government was doing with their own dredge at that time.

Q. Are you sure it was government dredge that did the work?

A. My memory is not certain, but the government had a dredge there and had it at work.

Q. How do you know it was a government dredge, and that it
74 was done by the United States Government?

A. I never saw their title to it, but they have charge of it, and everybody said it was the United States dredge.

Q. That is all you know of it; by hearsay?

A. By hearsay and general knowledge.

Q. This was in 1845 and 1846?

A. Yes, sir; I know it as I know the government owns the light-house; I don't know their title, but we suppose they own it.

Q. There has dredging below Rush street bridge since that time?

A. Yes, sir.

Q. By whom was it done?

A. Mr. Kirk; he has a soap factory there above Rush street bridge, and spews all his offal into the river, and then gets a dredge and dredges it out.

Q. Do you mean to say that is all the dredging the city has done between Rush street bridge and the mouth of the river?

A. No, sir; I do not.

Q. They have dredged the whole distance, haven't they?

A. Yes; they have dredged more or less all round; it keeps filling up; there is a sewer that comes in from Michigan avenue and one from Rush street, and empties a great deal of dirt in there. Kirk empties all his offal there and dredges alongside of the dock and leaves the bulk of it to float off.

75 Q. Since 1844, 1845, and 1846 the United States has done no dredging there to your knowledge?

A. Not to my knowledge.

A. E. GOODRICH.

Subscribed and sworn to before me this 12th day of April, A. D. 1882.

H. W. BISHOP,

Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

(Endorsed:) Filed June 22d, 1882. Wm. H. Bradley, cl'k.

76 R. W. HAYES, witness for complainant, testified:

That, during 1881, he was engaged in sailing the propeller Argonaut, of the complainant; that he was the master and the complainant the owner; that he made twenty-five trips between Chicago and Escanaba;

during the season ran up the Chicago River to the Union Iron and Steel works at Thirty-third street every trip; that in consequence of the closing of the bridges an hour in the morning and an hour in the evening he was detained with said propeller—July 15th, at Madison street bridge, from six to seven in the morning; August 1st, at Eighteenth street; August 30th, Madison street; September 2d, Halsted street; September 14th, at Twelfth street; September 29th, at Harrison street; October 10th, three hours at the Pittsburgh and Fort Wayne bridge; October
77 13th, at Main street bridge; October 28th, Eighteenth street; November 4th, at Rush street bridge; November 25th, Main street bridge; November 26th, for thirteen hours at the Alton and St. Louis bridge. That he lost an hour at each detention, except at the railroad bridges; that it is impossible to manage the time of arrival at Chicago so that he would not get there between six and seven in the morning, nor the time of leaving so that he would have no occasion to leave between five and a half and six and a half in the evening; that the detention of an hour at night would occasion the loss of more time than the hour; that he got his propeller into a jam at Madison street bridge, and was delayed twice; the first time he was there about six hours, caused by a big jam of boats; it happened by large propellers getting below the bridge going down and coming up, and was caused by the bridge being closed an hour in the evening, that it was the 31st of August, 1881; that the other time was on the 25th of November; that on the 26th of November he was detained thirteen hours at the Alton Railroad bridge.

(Objected to.)

That the jam was caused by the draw being too narrow for two boats to pass.

That he got his propeller into a jam at Madison street bridge two different times; the first time he was detained six hours; that it was caused by the bridge being closed for the hour; that the second time he was delayed from three to seven a. m.; that he thinks it was probably caused by the closing of the bridge in the evening for an hour; that he was detained also at the Alton bridge from eleven a. m. to twelve p. m.; that jam was caused by the boats lying there, and there was no room to get through between the abutments of the bridge and the bridge pier.

78 THOMAS G. BUTLIN, for complainant, testified:

That he was 57 years of age, and was connected with the Goodrich Transportation Company; that his business through life had been sailing on the Northwestern lakes, out of Chicago a good deal of the time, and had been acquainted with the Chicago River and harbor since 1842; that he thinks the government done some dredging down at the pier end of the river in 1842 and 1843; that the harbor piers on the south side came up to Fort Dearborn, that is where Rush street is now.

That the work was on the south side up to where Rush street is now; that the light-house was just above where Rush street bridge is; that the government has at different times done dredging and other work between the point where Rush street bridge is and the mouth of the river, since that time; that for some years Col. Slaughter was in charge of the work; the government had a dredge here, a crude affair, but they used to be digging with it; that the government removed or cut through the sand bar

at different times and done considerable digging; the mouth of the harbor was not as far out as now; it was only a short distance from Fort Dearborn to the mouth.

That the Goodrich Transportation Company runs 6 or 8 boats to Chicago; that they could not run their side-wheel boats up above Madison street, and some they could not get up that far, for the reason that they could not get through the bridge; that they had five side-wheel boats, and they do not take freight in them to points above those bridges,
79 but do in their propellers; that they have refused freight because they could not run up with the side-wheel boats.

On cross-examination he said:

That in 1842 they used to wind the boat at Rush street; that boat was 140 feet long; that they could have winded at Dearborn street, but that Reed's boats, which were 160 feet long, could not wind there, but had to go to the forks; that the docks of the Goodrich Transportation Company are below Rush street bridge, and in order to get to their docks they do not have to pass through any of the city bridges, and only go through the Illinois Central Railroad bridge.

On re-direct examination he said:

They had occasion to take their boats farther up the river than Rush street; that they loaded freight for up the river; that there is only one draw that can be relied upon to get through at the Illinois Central Railroad bridge (objected to), the other being blocked up almost invariably by a barge lying there; that the closing of the bridges for an hour in the morning and an hour in the evening caused a blockade between the entrance to the harbor and Rush street bridge, so they would be annoyed frequently with their boats going out, or turning around or getting in, for that matter; that he has seen lots of vessels waiting outside, ready to come up when the bridges are open, that had been delayed between Rush street bridge and the railroad bridge; that they fill the river up, sometimes, almost full; that that happens very often.

THOMAS JOHNSON, for complainant, testified:

That he was a sailor and master of a vessel; had been a sailor 16 years; sailed on lakes Michigan, Huron, and Erie in 1881. Had fre-
80 quently run up and down the Chicago River, and was well acquainted with it. Made 10 or 12 trips up and down that river after the city commenced to close the bridges, in July, '81, an hour in the morning and an hour in the evening; was delayed four or five times by such closing; that on one occasion he was chartered to get a load of grain at an elevator, and if he had got to the elevator at 6 o'clock he would have loaded that night, but he didn't get there on account of the bridges shutting, and had to wait until next morning, in consequence of the bridge being shut at 5½ o'clock; that a vessel that left that night, going to the same place he was, arrived two days before he did; that after he got his charter for the load it would have taken 20 minutes to have gone to the elevator, if he had not been delayed by the closing of the bridges.

STEPHEN GREEN, for complainant, testified:

That he was and had been master of a tug-boat on Chicago River 16

years; that the closing of the bridges on Chicago River in 1881, an hour in the morning and an hour in the evening, obstructed the navigation of the river coming down and going up, both morning and evening; in the evening coming down and in the morning going up; delayed all along the river, the whole length; that he was delayed a great many times; that it was a great deal more dangerous to take a vessel down the river after dark than by daylight; that the closing of the bridges between 5.30 and 6.30 p. m. makes it necessary to tow vessels down after dark after the 20th of September; that there was always plenty of room to pass through the tunnels.

On cross-examination he said:

He did a good deal of towing for complainant last year.

PETER PETERSON, for complainant, testified:

That he had sailed on the lakes 21 years, and the most of the time to and from Chicago; was master of a vessel last year; that he was acquainted with the Chicago River and its branches and remembered the fact that the city commenced in July, 1881, to close all the bridges upon the river an hour in the morning and an hour in the evening, and after that time he ran up and down the river 5 or 6 times; once or twice he happened to come down after six, when if he had been before six he could have got out that night, the reason was the bridge closed at 5.30 p. m., and the consequence was he was kept all night. After that he lost an hour at one time.

81 That he had passed through both the tunnels under the river, walking and driving; while walking through never found the tunnels crowded; no difficulty in getting through, and in the driveways for teams always found plenty of room.

(Objected to.)

JOHN SWEENEY, for complainant, testifies:

That he has been in the tug business on the Chicago River 17 years; that he recollects of the city commencing to close all bridges for an hour in the morning and an hour in the evening.

That the time between 6 and 7 in the morning and 5.30 and 6.30 in the evening is the best time for the business of towing vessels on the river; they would come in in the morning and they would get them up and out that evening, but if they were delayed by the ordinance they could not do it. When they had a vessel in tow at night and were attempting to get out before the bridge closed, they would run faster and increase the danger of running against other vessels; they would run greater risks and do more damage on that account, and the expense of towing vessels would be increased, in consequence of such closing of the bridges, at least ten per cent. on account of danger and damages.

After the ordinance went into force he lost in consequence of it one hour on each of two days in July; eight days in August, eight in September eight in October, six in November, and on three days in November one-half hour each. Was detained at Main street bridge—there were but very few passing the bridge at the time. At 6 o'clock for 5 or 10 minutes there would be quite a number, but after that but very few.

They closed the bridge promptly at 5.30 p. m. whether there was any travel or not. That was the case at all bridges. They would not open Kinzie street bridge to let a sinking tug be taken through to a dry-dock, but said she might sink.

Cross-examination:

He said for towing they charge by the trip and according to the size of the vessel, and charge no more than they did before the hour rule was passed, but can't earn as much money as before in consequence of loss of time.

82 JOHN O'GRADY, for complainant, testified:

That he had been a sailor 25 years; had sailed on the lakes the past year as master of the S. B. Pomeroy, and had made eight trips to Chicago; that his vessel was chartered for a cargo of corn one Saturday afternoon, and if they got to the elevator before 6 o'clock they could have loaded and been out on the lake, but could not get to the elevator for the bridge ordinance; the bridges were closed—would have arrived at the elevator at 6, if it had not been for the closing of the bridges for an hour, if nothing else had happened to prevent; the result was they were detained until Monday.

JOHN KEELIN, for complainant, swore:

That he had sailed on the lakes 22 years last season; he was the captain of a schooner sailing from Ford River to Chicago; made 24 trips; that he is acquainted with Chicago River; remembers that the city commenced to close the bridges an hour in the morning and an hour in the evening; that he was detained in consequence of such closing about four times; that this detention of an hour would occasion more loss of time by occasioning the crowding of vessels in one place, so that when the bridge opens it takes quite a while to get the vessels out of the way. They get jammed here and there, and get slewed across the river; their jib-booms foul with one another, and it may take another hour or two to get the jam cleared away so you can pass out; that more vessels are going into the river in the morning than at any other hour, and the most vessels are leaving along from 4 to 6 o'clock. He couldn't say there was any danger in vessels waiting outside the harbor to get in.

FAY NYMAN, for complainant, swore:

That for 20 years he had been captain of tug, principally on Chicago River; remembered that in July last, the city closed the bridges for an hour in the morning and an hour in the evening, and continued to do so until navigation closed. That generally the most towing is in the morning up the river; that the closing of the bridges for an hour in the morning and an hour in the evening obstructs navigation. If a man starts from the pier at 5 or 6 in the morning he cannot get clear up the river, if he is going to Bridgeport, and has to lay for the hour system. After that they hold the bridges for ten minutes alternately, and sometimes 3 or 4 vessels get to a bridge, and when they start they go as far as they
83 can. When they pass through one bridge up goes a red ball, and it is closed, and you have to go by fits and starts all the way

through. That the last summer he started at seven in the morning for Main street and didn't get up there till eleven o'clock; that after the hour ordinance went into force he was detained twenty times by it, amounting altogether to 19¼ hours; that these detentions of an hour at a time, in consequence of the bridge being closed led to other detentions which would have been avoided, to the extent that it caused jams in different parts of the river; that when vessels got to going one way they all kept going, and all got congregated in one particular place; that two or three might start and get to a bridge, especially at Twenty-second street, when most of the time there is only one draw that can be used, and of course two vessels cannot pass going in different directions through the same draw, and have to wait; that such jams cause great delay; that he was detained five hours at one time last summer.

That he has occasion to pass through the tunnels under the river, and never found them crowded with people since the Chicago fire, but always plenty of room to pass through; that there are two tunnels, one at La Salle street, under the main river, and the other at Washington street, under the south branch.

Cross-examination:

That he knew of jams before the hour ordinance was passed, plenty of them on account of the ten-minute system; that he charges no more for towing now than before the hour ordinance was passed, and does not earn as much in towing vessels now as before.

(86–87, 88–89, 90–91 contain deposition of complainant's witness, Chamberlain, which is withdrawn.)

JAMES MCILWEE, for complainant, testified that he was a sailor between Chicago and other places.

That the closing of the bridges for an hour in the morning and an hour in the evening was a material obstruction to the navigation of the Chicago River; at that time there would be the most towing up and down, arriving in the morning and departing in the evening; that if you do not get to the elevators before 6 o'clock they shut down and you have to remain until morning; if it is Saturday night you remain until Monday; that he had his vessel chartered for a load at an elevator, and did not get there in time to load that night; that they had refused charters
84 when they saw that they could not get to the elevator in time on account of the closing of the bridges, and in consequence they would lose quite a percentage on freight, and the vessel delayed twelve or twenty-four hours, with the whole crew. Once lost ¾ of a cent a bushel on 48,000 bushels of grain; that they did not take the charter, but would have done so but for the closing of the bridges; that the running of vessels cannot be so regulated when bound for Chicago as that she will get into the river before 6 o'clock, or else not arrive until after 7 o'clock without loss of time.

CHARLES N. MYERS testified on behalf of complainants that he had resided in Chicago since 1848; that he is now engaged in tugging; that since he has been in Chicago the most of the time he has been in different branches of business; that he has been employed by the government in dredging at Chicago and other places; that he was employed in Chicago

by the government in 1855 and continued until 1859; that he had charge of the dredging under Col. Graham; that Col. Graham was the U. S. engineer here, and had charge of the harbor improvements; that he was at work dredging for the government on the bar at the end of the north pier, but never dredged above where the iron light-house stands now, on the pier, but from that point out; that the depth of the water in the main river at that time (where Rush street bridge is now) close by F't Dearborn, where they used to lay up the dredge, was about 24 feet, run from 18 to 24 feet along up; that there was a ferry where Rush street bridge is now operated by the city; that no dredging had been done by the city in the Chicago River at that time that he knew of; that he knows the practice of the city in closing bridges; that between the hour in the morning and the hour in the evening when they are closed all the time, the practice is if the bridge has not been open three minutes they close it and make him wait ten minutes before he can get through; that before the hour ordinance the practice gave them ten minutes and took ten minutes.

Cross-examination:

That the iron light-house is where the end of the pier used to be; they have extended the pier out further, probably 80 rods east of Rush street; that the bar was at the end of the pier—80 rods or near half a mile east of Rush street; that there was water enough for the vessels at that time without any trouble; that the vessels were not as large then as now.

85 Redirect examination:

That he commenced working for the government, dredging, in 1855, and continued until 1859, and worked every season; that there were other men working; that he had seventeen under him; that besides dredging, the government was building piers.

WILLIAM HARMAN testified on behalf of complainant:

That he had been tug manager 23 years.

That the closing of all bridges for an hour in the morning and an hour in the evening occasioned other loss of time than simply the time the bridges were closed; that there are about forty tugs towing vessels, and the morning and evening is the busiest time, and a crowd accumulates.

That he had frequently passed through the tunnels under the river, and never but once found them crowded.

Knew of several cases of vessels that have been detained in consequence of damages received in these jams, for repairs, and have lost a trip, and other vessels made the trip and back again while they were detained.

On cross-examination testified:

That he had known of damages occasioned by jams before the hour closing commenced, but not to the same extent. Commerce by lake and river to and from Chicago since the hour closing had decreased to a certain extent; vessels that should have been unloaded that came in the morning have been delayed so that they were unable to get out; knows of several cases where fewer trips have been made; same number of vessels traded.

J. A. CRAWFORD testified for complainant:

That he had been captain of tug on Chicago River.

That the closing of the bridges for an hour in the morning and an hour in the evening was a great obstruction to the navigation of the river.

Had estimated, upon facts and observation, that the number of vessels in the aggregate that would be detained during the hour the bridge is closed would be, on an average, 40 vessels and 10 propellers, and
86 the valuation of the fleet and cargo from $2,000,000 to $3,000,000, and from 300 to 500 men, all under pay.

That he had frequently gone through La Salle street tunnel, and never found but few people in there, though a crowd might be waiting at the bridge. Tunnels were in suitable condition to pass through.

On cross-examination testified:

Could not tell number of times made estimates of vessels detained by closing of bridges; done it frequently between all the bridges in the river; made figures of number of tugs that were up the river with vessels that were detained; was not on the ground and saw vessels detained. Made no actual estimate of value of vessels or their cargoes—general idea—will not swear knew the load each vessel had, what it was, or how much it was worth.

Testimony of complainant's witness, Wm. Crawford, omitted, being cumulative.

Deposition of complainant's witness omit'ed as cumulative, and not signed.

ANDREW GREEN, for complainant, testified:

That he had been in tug business on Chicago River twelve years; that he had measured the draw and bridge pier at Halstead street; that width of channel was 48 feet, and width of bridge protection 37 feet; that channels are same width on each side of bridge protection; that it is very close work to go through with anything; that the river above the bridge makes a bend, and bridge sets on an angle, is not square, which makes the protection right in the way; that there is difficulty in passing west down at Harrison street for the reason that the docks set out almost even with the approach of the bridge, and it is almost impossible to get a vessel down through that draw with any draught of water; that there is difficulty also at the east draw in going through. You make a bend just as you enter the bridge, and it is about all a tug can do to take an ordinary schooner through and keep her head gear out of the approach of the bridge on east side, in making the turn; that it is a canal dock, and is seldom free from having a boat, and sometimes two, lying at the dock.

87 ANDREW WILSON, for complainant, testified:

That he was tug captain on the Chicago River; that once after city commenced to close bridges, for an hour at a time, he kept track of the vehicles that went over Throop street bridge for an hour that the bridge was closed in the evening; that he counted 17 vehicles of all kinds,

and should judge there were 75 people that passed over during the hour; that he laid over an hour to get a tow, but they kept him an hour, so he could not make the tow.

JAMES L. HIGGIE testified for complainant:

That he was a vessel owner and president of Vessel Owners' Towing Co.; that their business was towing vessels on Chicago River. Company owned fourteen tugs in 1881. City commenced to enforce ordinance closing bridges an hour in morning and an hour in evening about July 15th, 1881. Such closing of the bridges is a great damage to free navigation of river. From six in morning until seven at night, taking the two hours and every alternate ten minutes during day and other detentions, leaves us from four and a half to five hours during that time to do our work. By closing all bridges when vessels begin to move there are a great many places they cannot exactly pass, and when vessels are lying both sides of river leaves sometimes but one channel, and sometimes makes a general blockade of river that lasts sometimes half a day and almost stops business. Last year it nearly trebled our damages in consequence of enforcing hour ordinance. That they paid $8,200 damages last year. That sometimes bridge-tenders would shut bridge when a vessel was entering; shut it right on jib-boom and let consequences be what they would; those damages were usually paid to vessels, and part to city,

Should think earnings were reduced from 25 to 40 per cent. in consequence of hour ordinance. Know of two tunnels under river—Washington street and La Salle street. Most travel across Madison and Clark street bridges, or Wells street. It is one block from Madison street to tunnel, and one block from Clark street, and one block from Wells street to tunnel. That he frequently drives through west side tunnel and never found any difficulty in getting through on account of being crowded; always had good access.

88 GEORGE W. HOTCHKISS testified on behalf of complainant:

That he was secretary of the Lumberman's Exchange, Chicago, and was in 1881. The amount of lumber received at Chicago during the year 1881 by lake was 1,663,000 feet, 772,000,000 shingles, 104,000,000 feet of lath, 2,846,000 posts, 4,000,000 ties, 85,000 cords of wood, slabs, and bark, 86,000 telegraph poles, and 25,000 piles; that it was discharged at different places from the mouth of the river, principally on the south branch in the neighborhood of Twenty-second street; that is the principal locality for lumber-yards, and is termed the lumber district; that the tendency of the lumber trade is towards the south; that there are several lumber-yards a mile further south than anything has been before.

On cross-examination he said:

He could speak of direct damage of his own knowledge to the lumber trade; that the loss would not fall on the vessel-men without affecting the dealers, for the reason that if the vessel must take so much longer for a trip they must charge more for the freight. A great majority of the lumber dealers are owners of vessels.

THOMAS L. PARKER testifies on behalf of complainant:

That he came to Chicago in 1841; sailed a vessel; was at that time ac-

quainted with the south branch; run a vessel up the south branch in 1842; about 12 or 14 feet of water then.

On cross-examination he said:

That he didn't think that the south branch was much over 100 feet wide, perhaps 130 feet at that time. That he thinks it was 12 or 14 feet deep. He thinks the banks sloped at an angle of about 40 degrees; that they could wind a vessel 138 feet long in the south branch above Jackson street.

89 WALTER G. KIRCHEVAL testified on behalf of complainant:

That he was marine reporter of the Chicago Tribune; that he had been up and down the river several times, and had charge of reporting marine interests and river news; that he recollects the fact that in July, 1881, the city commenced to close all the bridges in the morning between 6 and 7, and in the evening between half past 5 and half past 6, and that it continued that practice during the balance of the season; that on the evening of Saturday, July 9th, he was up the north branch and started to come down the main river on a tug between half past 5 and half past 6, and they got to Chicago avenue bridge and the red ball was up and the tug was obliged to stop; could not go under the bridge because it was too low; it was getting late, and he was anxious to get down; that he stood on the tug while they tied up alongside the piling of the bridge, and stood there 26 minutes; during that time just one wagon and 23 persons went over the bridge.

Cross-examination:

About six o'clock p. m. workmen go to their homes from the south side to the north and west sides, and have to cross the bridges in order to get home. On the north branch, above Kinzie street, there is not so much travel at that hour. About six p. m. the majority of the teams cross from the south side to the west side. It is, of course, impossible for a vessel in the neighborhood of Chicago avenue to clear the harbor, even if the bridges on the north branch were open, as the bridges on the main river would prevent.

90 ROBERT CLIDESDALE, for complainant, testified:

That he had resided in Chicago since 1835; his business was sailing; that he is acquainted with the Chicago River, and became acquainted first in 1835; that there was a bar across the mouth of the river in 1835; that the government removed it; that in 1835 they used to go up south branch to what they called the lime-kiln and load-stone; that was up close to the locks at Bridgeport; it was close to the south fork of the south branch. The vessel he was on at that time was about 60 tons, and she drew about seven feet of water loaded; had no difficulty so far as depth was concerned, except they would sag against the bank once in a while when the wind would drive her against the bank, then they would—

[Balance of this deposition erased in original.—*Printer.*]

91 JOSEPH C. PERRETT, a witness for complainant, testified:

That he was a sailor and superintendent of Marinette Barge Line Co., a line that brings lumber to Chicago, running 9 barges and a

tug, and that they made 50 round trips to Chicago in '81; that the closing of bridges for an hour at a time delayed their boats; he should think 15 hours for each boat; that he calculated they lost $15 an hour when delayed.

92 JOHN B. WARREN testified for complainant:

That he was United States local inspector of steamboats in the Chicago district; that the Chicago district took in the Chicago River; that they had nothing to do with the canal. That was a State institution; that when canal-boats come into the Chicago River, or on the Illinois River, then he inspected them; that when they come into the Chicago River they came within his jurisdiction as United States inspector. That as soon as they left the canal and struck the waters of the Chicago River they were in United States waters, and under his jurisdiction.

GEORGE E. MERRITT, for complainant, testified:

That he is master of the steamer Inter-Ocean; lives in Detroit; has been master two seasons. The complainant is the owner of the steamer; that last season he was running from Escanaba to Bridgeport, on the south branch of the Chicago River, and made 27 trips, carrying iron ore; was delivering the ore at the rolling mills at Bridgeport. That he is acquainted with the main branch and south branch of the Chicago River up to where he delivered the cargo; that he is acquainted with the bridges; that there are in the neighborhood of 20 bridges that he had to pass through in going to the docks of the rolling mills; that he don't remember
93 the exact number of trips he made after the city commenced to close the bridges last season, but had a log of it, and could state from that; referring to the paper, he stated that it was 15 trips, and that the closing of the bridges was a serious obstruction to the navigation of the river; that he was obstructed in running his steamer up the river in consequence of closing the bridges; that he had got the number of times he was delayed; he had the date upon a paper taken from the logs that he kept; that he kept a log last season, the length of time and the dates; it was in his own handwriting, and was correct; that it showed the detention in regard to the steamer Inter-Ocean.

The paper was produced and annexed, and marked Exhibit One (1), and was as follows:

TIME LOST BY HOUR SYSTEM AT BRIDGES.

July 13. One hour at 22d-street bridge, 6–7 morning, in tow Constitution, up creek.
" 28. One hour at Rush-street bridge, 6–7 morning, in tow tug Owen, up creek.
Aug. 6. One hour at 22d-street bridge, 6–7 morning, in tow tug Constitution, up creek.
" 17. One hour at 18th-street bridge, 5.30–6.30 evening.
" 18. One hour at Van Buren-street bridge, 5.30–6.30 evening, in tow tug Owen, both times going down creek.
Sept. 28. One hour at 12th-street bridge, 5.30–6.30 evening, in tow tug Success.

Oct. 13. One hour at Main-street bridge, 5.30–6.30 evening, in tow of tug Owen, going down creek.
" 20. One hour at Main-street bridge, 5.30–6.30 evening, in tow tug Owen, down creek.
Dec. 2d. One hour at Halstead-street bridge, 5.30–6.30 evening, in tow tug Brown.

That the closing of the bridges for an hour in the morning and an hour in the evening occasioned other delays than simply loss of time; that if he hadn't lost an hour in getting up to the rolling-mill he would undoubtedly have been unloaded that day and got out, whereas he had to lay over night on account of darkness coming on; the men wouldn't work after dark. That that happened three or four times on the up trip. That he was delayed once by a jam at the entrance of the river; the jam was caused by a large fleet of vessels being bridged at Rush street, on
94 account of the hour rule; it was in the morning. His vessel was enrolled, and he has the enrollment certificate. He produced it, and it was offered in evidence; also certificate and license issued in the district of Port Huron to the complainant for the propeller Inter-Ocean, dated April 23d, 1881.

It was here admitted by counsel for both parties that the steamer Argonaut, owned by the complainant, was also enrolled and licensed in like manner as the steamer Inter-Ocean.

On cross-examination, he said:

That the paper which he had attached as an exhibit was taken from his own log; that he kept a minute of everything.

The draft of his boat when loaded was 13 feet 8 inches aft and 13 feet and 4 inches forward. Empty, it drew 9 feet aft and 5 feet forward.

218–225 contain deposition of complainant's witness, Job J. Hickman; omitted, being cumulative.

J. G. LYDECKER, for complainant, testified:

That he belonged to the Corps of Engineers of the United States Army, and was and had been since 1877 the engineer in charge of all the river and harbor improvements at Chicago. The map accompanying his annual report for 1879 is official, showing condition of improvements at that time. Channel was dredged, as indicated on map, "16½ feet channel dredged in 1878," under supervision of R. S. Littlefield, inspector of the dredging that year; that he, witness, had general supervision and directed what should be done; that the United States has done dredging in the Chicago River above the point where that channel connects with the river since he had been in Chicago, but not west of light-house shown on map; that the United States did little dredging along that point to recover stones that had filled in the channel's way; knows by general report that the government has done dredging in Chicago River above the point where light-house is since 1833, but had no personal knowledge on the subject.

That the immediate object of dredging the channel was to enable vessels to pass and repass entering the river, so far as dredging that year

was concerned, but at same time to form part of completed plan for deepening the whole.

Should imagine the diagrams shown in report at pages 152, 192,
95 252 to be what they purport to be; that what is there stated in reference to condition of Chicago River and improvements agreed generally with the history of the improvements, as he was informed.

(Objected to.)

That he recognized the report of his predecessor, Major Gillespie, in regard to Chicago River, harbor, and improvements; that reference to Chicago harbor commences on page following page 4 and ends on page 17, and that the history of work on page 12 up to year 1875 are those upon which he based the statement of his report as to what had been done before he came. (The map attached to report of witness and report of Major Gillespie referred to offered in evidence, and the originals are hereto attached.)

On cross-examination, testified that the object of outer harbor was to relieve Chicago River by providing an area within which docks and slips might be constructed for commercial purposes and incidentally refuge for vessels. Has been completed to extent indicated on map. It is designed as an outer harbor.

Redirect examination:

What he conceived to have been object of harbor is set forth in his letter commencing on page of report 1562 and ending on page 1567.

ALBERT T. SPENCER, for complainant, testified:

That he commenced early in life a sailor, and had followed that and transportation business since, as owner and agent of boats; office in Chicago; that the light-house at time he commenced steamboating and several years after was on south side of main branch of river, little west of where Rush street bridge is at present; that it stood there in 1849; was quite a sharp turn in the river there—point of land from south side pointing out pretty near northwest; part of it has since been excavated; that the light-house remained until that point was excavated.

That he thinks the circle marked light-house on map certified by Secretary of War, November 29, 1881, is up the river as far as the light-house stood. Government done dredging below Rush street.

On cross-examination, testified:

That light-house now was on end of the pier. Government has no light-house west of Rush street bridge. Never knew of the government or city doing any dredging west of Rush street bridge.

96 Redirect:

That the place where the light-house used to stand is now used for what is called night clearing office, used by the government in connection with navigation of lake and river. It is merely a branch of the custom-house.

97 The complainant next introduced in evidence the original certificates of license and of enrollment of its propeller Escanaba, as follows:

98 (Per certificate No. 122. Official number. Numerals . Letters .]

THE UNITED STATES OF AMERICA.

Sec. 4319 Rev. Stats. [Cut of vessel.] Catalogue No. 538½.

Certificate of enrollment.

(Enrollment:) In conformity to title L, "Regulations of vessels in domestic commerce," of the Revised Statutes of the United States.

* T. C. Owen, president; having taken and subscribed the oath required by law, and having sworn that the † Escanaba and Lake Michigan Transportation Company of Marine City are (by shares) the sole owners of the ship or vessel called the Escanaba, of Marine City, whereof John Q. Owen, is at present master, and as he hath sworn is a citizen of the United States, and that the said ship or vessel was built at Gibraltar, Mich., in the year 1881, as appears by ‡ the certificate of Linn & Craig, master carpenters, dated Detroit, May 6, 1881, on file in this office, and J. C. Parry, dept. collector, having certified that the said ship or vessel has two decks and three masts, and that her length is 201 $\frac{}{10}$ feet; her breadth, 35 $\frac{6}{10}$ feet; her depth, 20 $\frac{1}{10}$ feet; her height $\frac{}{00}$ feet; that she measures 1,160 and $\frac{56}{100}$ths tons, viz:

	Tons.	100 ths.
Capacity under tonnage deck	1,	101 09
Capacity between decks above tonnage deck		
Capacity of inclosures on the upper deck, viz:		59 47
Total tonnage	1,	160 56

that the following described spaces, and no others, have been omitted, viz: , and that she is a § propeller, has a plain head and stern, and ‖ the said T. C. Owen, president, having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said title, the said ship or vessel has been duly enrolled at the port of Port Huron.

Given under my hand and seal, at the port of Port Huron, in the district of Huron, this 7th day of May, in the year one thousand eight hundred and eighty-one.

[SEAL.]

H. BOTSFORD,
Dep. Collector of Customs.

Naval Officer.

* Insert here the name of the person, with his occupation and place of abode, by whom the oath or affirmation is to be made.

† If more than one owner, insert the words "together with," and the name or name occupation or occupations, place or places of abode of the owner or owners, and the part or proportion of vessel belonging to each owner.

‡ Here describe previous document.

§ Insert here the particular kind of vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else.

‖ In every original enrollment insert the following: "the said ——— having agreed to the description and measurement above specified, and."

(On left margin:) Northern, northeastern, and northwestern frontiers of the United States.

Indorsements of change of master.

DISTRICT OF , PORT OF ,
, 188 .
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
Of Customs.

DISTICT OF , PORT OF ,
, 188 .
having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
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DISTRICT OF , PORT OF ,
, 188 .
having taken the oath required by law, is at present master of the within-named vessel in lieu of , late master.
Of Customs.

(Indorsed:) (Cat. No. 538½). Frontier certificate of enrolment No. 122, of the propeller called the Escanaba, 1,160 $\frac{56}{100}$ tons, issued at the port of Port Huron, district of Huron, May 7, 1881. Jno. P. Sanborn, colle'r of customs. Date of surrender: . Where surrendered: . Cause of surrender: . collector of customs. [Cut.]

99 [P. W. License No. 227. Cat. No. 541½. Official number.—Numerals . Letters .]

THE UNITED STATES OF AMERICA.

License of vessel of twenty tons or upwards to carry on the coasting and foreign trade on the northern, northeastern, and northwestern frontier, otherwise than by sea for one year.

DISTRICT OF HURON, PORT OF PORT HURON.

In pursuance of title L, "regulation of vessels in domestic commerce," of the Revised Statutes of the United States,† the Escanaba & Lake Michi-

gan Transportation Company of Maimi City, by T. C. Owen, president, owners, John Q. Owen, master, having given bond that the propeller called the Escanaba, whereof the said J. Q. Owen is master, burden 1,160 tons and 56 hundredths, as appears by her enrollment issued at‡ Port Huron, May 7, 1881, No. 122, shall not be employed in any trade while this license shall continue in force, whereby the revenue of the United States shall be defrauded; and having also§ sworn that this license shall not be used for any other vessel, or for any other employment than is herein specified, license is hereby granted for the said propeller called the Escanaba to be employed in carrying on the* coasting trade for one year from the date hereof, and no longer.

Given under my hand and seal, at the port of Port Huron, in the district of Huron, this 7th day of May, in the year one thousand eight hundred and eighty-one.

[SEAL.] H. BATSFORD,
Dep. Collector of Customs.

[SEAL.]
Naval Officer.

† Insert the name of the husband or managing owner, with his occupation and place of abode, and the name of the master, with the place of his abode.
‡ Insert name of district, day, month, and year, in words at length.
§ "Sworn" or "affirmed," as the case may be.

Indorsements of change of master.

DISTRICT OF , PORT OF ,
188 .

, having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
Of Customs.

DISTRICT OF , PORT OF ,
188 .

, having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
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Of Customs.

DISTRICT OF , PORT OF ,
188 .

, having taken the oath required by law, is at present master of the within-named vessel, in lieu of , late master.
Of Customs.

(Indorsed:) (Cat. No. 541½.) Frontier license of vessel of twenty tons or upwards. License No. 227, of the propeller Escanaba. 1,160.$\frac{56}{100}$ tons. Issued at the port of Port Huron, district of Huron, May 7, 1881. Date of surrender . Where surrendered . Cause of surrender . , collector of customs. [Cut.]

100 The complainant also introduced in evidence like certificates of its propellers Inter-ocean and Argonaut. (See certificate of Escanaba, page 98.)

101 Complainant then offered in evidence a map certified by the Secretary of War, dated Nov. 29th, 1881, and also a map of township 39 north, range 14 east, 3rd p. m.

Also the annual report of the trade and commerce of Chicago, compiled for board of trade by Charles Randolph, secretary.

102 Also certain portions of certain acts of Congress, to wit: So much of an act of March 3, 1831, entitled "An act making appropriations for building light-houses," &c., found in vol. 4 U. S. Statutes at Large for 1831, page 491, as reads as follows:

CHAP. CIII.—An act making appropriations for building light-houses, light-boats, beacons, and monuments, and placing buoys.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following appropriations be, and the same are hereby, made and directed to be paid out of any money in the Treasury not otherwise appropriated, to enable the Secretary of the Treasury to provide by contract for building light-houses, light-boats, beacons, and monuments, and placing buoys, to wit:

* * * * * * *

State of Illinois: Five thousand dollars for building a light-house at the mouth of Chicago River, Lake Michigan.

* * * * * * *

So much of an act of March 2, 1833, entitled "An act for improving the navigation of certain rivers, &c., found in vol. 4 U. S. Statutes at Large for 1833, page 645, as reads as follows:

CHAP. LXIV.—An act for improving the navigation of certain rivers in the Territories of Florida and Michigan, and for surveys and for other purposes.

103 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of removing obstructions and improving the navigation of certain rivers in the Territories of Florida and Michigan, the followings sums be, and they are hereby, appropriated, to be paid out of any money in the

Treasury, to be expended under the direction of the President of the United States:

* * * * * * *

For improving the harbour at Chicago, on Lake Michigan, twenty-five thousand dollars.

* * * * * * *

So much of an act of June 28, 1834, entitled "An act making additional appropriations for certain harbours," &c., found in vol. 4, U. S. Statutes at Large for 1834, page 703, as reads as follows:

CHAP. CIII.—An act making additional appropriations for certain harbours, and removing obstructions in the mouths of certain rivers, for the year one thousand eight hundred and thirty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, to be paid out of any unappropriated money in the Treasury, for carrying on and completing certain works heretofore commenced, viz:

* * * * * * *

For improving the harbour of Chicago, Illinois, thirty-two thousand eight hundred and one dollars.

* * * * * * *

104 So much of an act of March 3, 1835, entitled "An act making additional appropriations for the Delaware Breakwater, and for certain harbours," &c., found in vol. 4, U. S. Statutes at Large for 1835, page 754, as reads as follows:

CHAP. XXVI.—An act making additional appropriations for the Delaware Breakwater, and for certain harbours, and removing obstructions in and at the mouths of certain rivers, for the year one thousand eight hundred and thirty-five.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for carrying on and completing certain works heretofore commenced, viz:

For improving the harbour of Chicago, in addition to the balance of former appropriations, thirty-two thousand eight hundred dollars.

* * * * * * *

So much of an act of July 2, 1836, entitled "An act making additional appropriations," &c., found in vol. 5, U. S. Statutes at Large for 1836, page 67, as reads as follows:

CHAP. CCLIX.—An act making additional appropriations for the Delaware Breakwater and for certain harbors, and removing obstruc-
105 tions in and at the mouths of certain rivers, and for other purposes, for the year one thousand eight hundred and thirty-six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be,

and the same are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for carrying on and completing certain works heretofore commenced, viz:

* * * * * * *

For continuing the improvement of the harbor of Chicago, Illinois, thirty-two thousand dollars.

* * * * * * *

So much of an act of March 3, 1837, entitled "An act to provide for certain harbors," &c., found in vol. 5, U. S. Statutes at Large for 1837, page 187, as reads as follows:

CHAP. XLIV.—An act to provide for certain harbors and for the removal of obstructions in and at the mouths of certain rivers, and for other purposes, during the year one thousand eight hundred and thirty-seven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for carrying on and completing certain works heretofore commenced, to wit, for continuing the improvement of the harbor of Chicago, Illinois, forty thousand dollars.

* * * * * * *

So much of an act of July 7, 1838, entitled "An act to provide for certain harbors," &c., found in vol. 5, U. S. Statutes at Large for 1838, page 268, as reads as follows:

CHAP. CLXXI.—An act to provide for certain harbors and for the
106 removal of obstructions in and at the mouths of certain rivers, and for other purposes, during the year one thousand eight hundred and thirty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for carrying on and completing certain works heretofore commenced, viz:

For continuing the improvement of the harbor of Chicago, Illinois, thirty thousand dollars.

* * * * * * *

So much of an act of March 3, 1843, entitled "An act for the protection of commerce on Lake Michigan," found in vol. 5, U. S. Statutes at Large for 1843, page 619, as reads as follows:

CHAP. LXXXV.—An act for the protection of commerce on Lake Michigan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for the protection of commerce on Lake Michigan:

* * * * * * *

For continuing the public works at the harbor of Chicago, in the State of Illinois, for the said half calendar year, ten thousand dollars; and for the said fiscal year, fifteen thousand dollars.

* * * * * * *

107 So much of an act of June 11, 1844, entitled "An act making appropriations for the improvement of certain harbors and rivers," found in vol. 5, U. S. Statutes at Large for 1844, page 662, as reads as follows:

CHAP. XLIV.—An act making appropriations for the improvement of certain harbors and rivers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, to be paid out of any unappropriated money in the Treasury for the prosecution and completion of the following works, viz:

* * * * * * *

For the further improvement of the harbor of Chicago, Illinois, thirty thousand dollars.

* * * * * * *

So much of an act of August 30, 1852, entitled "An act making appropriations for the improvement of certain harbors and rivers," found in vol. 10, U. S. Statutes at Large for 1852, page 58, as reads as follows:

CHAP.—CIV. An act making appropriations for the improvement of certain harbors and rivers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and the same are hereby, appropriated, to be paid out of
108 any money in the Treasury not otherwise appropriated, and to be expended under the superintendence of the Secretary of War for the following purposes, to wit:

* * * * * * *

For continuing the improvement of the harbor of Chicago, Illinois, twenty thousand dollars.

* * * * * * *

So much of an act of June 23, 1866, entitled "An act making appropriations for the repair, preservation, and completion of certain public works," &c., found in vol. 14, U. S. Statutes at Large for 1866, page 72, as reads as follows:

CHAP. CXXXVIII.—An act making appropriations for the repair, preservation, and completion of certain public works heretofore commenced under the authority of law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money

be, and the same are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended under the direction and superintendence of the Secretary of War for the repair, preservation, and completion of the following works heretofore commenced under the authority of law, and for the other purposes hereinafter named, that is to say:

* * * * * * *

For improvement of harbor at Chicago, Illinois, eighty-eight thousand seven hundred and four dollars.

* * * * * * *

109 So much of an act of July 11, 1870, entitled "An act making appropriations for the repair, preservation, and completion of certain public works," &c., found in vol. 16, U. S. Statutes at Large for 1870, page 226, as reads as follows:

CHAP. CCXL.—An act making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes, for the fiscal year ending June thirtieth, eighteen hundred and seventy-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended under the direction and superintendence of the Secretary of War, according to such plans as shall be by him first selected and approved for, the repair, preservation, and completion of the following public works heretofore commenced under the authority of law, and for other purposes hereinafter named, that is to say:

* * * * * * *

For enlargement of harbor facilities at Chicago, Illinois, according to the plans of the engineer department, one hundred thousand dollars, and for a harbor of refuge fifty thousand dollars.

* * * * * * *

So much of an act of June 10, 1872, entitled "An act making appropriations for the repair, preservation, and completion of certain
110 public works," &c., found in vol. 17, U. S. Statutes at Large for 1872, page 370, as reads as follows:

CHAP. CDXVI.—An act making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, for the repair, preservation, and completion of the following public works hereinafter named:

* * * * * * *

For the improvement of Chicago Harbor, Illinois, ninety thousand dollars.

* * * * * * *

So much of an act of March 3, 1873, entitled "An act making appropriations for the repair, preservation, and completion of certain public works," &c., found in vol. 17, U. S. Statutes at Large for 1873, page 560, as reads as follows:

CHAP. CCXXXIII.—An act making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the
111 Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War for the repair, preservation, and completion of the following public works, hereinafter named:

* * * * * * *

For the improvement of Chicago Harbor, Illinois, ninety thousand dollars.

* * * * * * *

So much of an act of June 23, 1874, entitled "An act making appropriations for the repair, preservation, and completion of certain public works," &c., found in vol. 18, U. S. Statutes at Large for 1874, page 237, as reads as follows:

CHAP. 457.—An act making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War for the repair, preservation, and completion of the following public works hereinafter named:

* * * * * * *

For continuing the improvement of the harbor at Chicago, seventy-five thousand dollars.

* * * * * * *

So much of an act of March 3, 1875, entitled "An act making appropriations for the repair, preservation, and completion of certain
112 public works," &c., found in vol. 18, U. S. Statutes at Large for 1875, page 456, as reads as follows:

CHAP. 134.—An act making appropriations for the repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, for the repair, preservation, and completion of the following public works hereinafter named:

* * * * * * *

For the improvement of the harbor at Chicago, Illinois, seventy-eight thousand dollars.

* * * * * * *

So much of an act of August 14, 1876, entitled "An act making appropriations for the construction, repair, preservation, and completion of certain public works," &c., found in vol. 19, U. S. Statutes at Large for 1876, page 134, as reads as follows:

CHAP. 267.—An act making appropriations for the construction, repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the
113 United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, for the repair, preservation, construction, and completion of the following public works hereinafter named:

* * * * * * *

For the improvement of the harbor at Chicago, Illinois, five thousand dollars.

* * * * * * *

So much of an act of June 18, 1878, entitled "An act making appropriations for the construction, repair, preservation, and completion of certain public works," &c., found in vol. 20, U. S. Statutes at Large for 1878, page 156, as reads as follows:

CHAP. 264.—An act making appropriations for the construction, repair, preservation, and completion of certain public works on rivers and harbors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, for the repair, preservation, construction, and completion of the public works hereinafter named:

* * * * * * *

For improving harbor at Chicago, Illinois, extending break-
114 water and dredging channel, seventy-five thousand dollars.

* * * * * * *

So much of an act of March 3, 1879, entitled "An act making appropriations for the construction, repair, preservation, and completion of certain works," &c., found in vol. 20, U. S. Statutes at Large for 1879, page 368, as reads as follows:

CHAP. 181.—An act making appropriations for the construction, repair, preservation, and completion of certain works on rivers and harbors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, for the construction, completion, repair, and preservation of the public works hereinafter named:

* * * * * * *

For improving harbor at Chicago, Illinois, seventy-five thousand dollars.

* * * * * * *

So much of an act of March 3, 1881, entitled "An act making appropriations for the construction, completion, repair, and preservation of certain works," &c., found in vol. 21, U. S. Statutes at Large for 1881, page 471, as reads as follows:

115 CHAP. 136.—An act making appropriations for the construction, completion, repair, and preservation of certain works on rivers and harbors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, and to be expended under the direction of the Secretary of War, for the construction, completion, repair, and preservation of the public works hereinafter named:

* * * * * * *

Improving outside harbor at Chicago, Illinois, dredging in outer harbor, and constructing exterior breakwater, one hundred and fifty thousand dollars.

* * * * * * *

Also act of Congress defining district of Michilimackinac, found in vol. 1, U. S. Statutes at Large, p. 638.

Also sec. 8 of act passed June 30th, 1834, vol. 4, page 716, establishing ports of entry.

Also an act of July 16, 1846, entitled an act to establish the collection district of Chicago, found in vol. 9, U. S. Statutes at Large, page 38, to wit:

CHAP. LVI.—An act to establish the collection district of Chicago.

116 Be it enactad by the Senate and House of Representatives of the United States of America in Congress assembled, That a collection district be, and hereby is, established upon the western shore of Lake Michigan, to be called the district of Chicago, within which the port of Chicago shall be a port of entry. The said district shall include the territory, harbors, rivers, and waters on the western shore of said lake from the line dividing the States of Indiana and Illinois northward to the town and river Sheboygan, and inclusive of the same, which are within the Territory of Wisconsin. A collector shall be appointed for said district who shall receive the same amount of annual compensation as the collector of the district of Michilimackinac.

Approved July 16, 1846.

So much of an act of Illinois passed February 14, 1851, found in Session laws of Illinois for first session of 1851, entitled an "Act to reduce the law incorporating the city of Chicago," &c., as reads at pages 132 and 147, as follows, to wit:

An act to reduce the law incorporating the city of Chicago, and the several acts amendatory thereof, into one act, and to amend the same.

* * * * * * *

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly. * * *

117 The harbor of the city shall include the piers and so much of Lake Michigan as lies within the distance of one mile thereof into the lake, and the Chicago River and its branches to their respective sources.

* * * * * * *

So much of an act of May 18, 1796, entitled "An act providing for the sale of the lands of the United States, &c., found in vol. 1, U. S. Statutes at Large for 1796," as reads at pages 464 and 468 as follows, to wit:

CHAP. XXIX.—An act providing for the sale of the lands of the United States in the territory northwest of the River Ohio and above the mouth of Kentucky River.

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

* * * * * * *

SEC. 9. And be it further enacted, That all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to be, and remain public highways, and that in all cases, where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both.

* * * * * * *

So much of an act of March 26, 1804, entitled an act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes, found in vol. 2, U. S. Statutes at Large for 1804,

118 as reads at pages 277 and 279 as follows:

CHAP. XXXV.—An act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes. (*a*.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

* * * * * * *

SEC. 6. And be it further enacted, That all the navigable rivers, creeks, and waters, within the Indiana Territory, shall be deemed to be and remain public highways, (*a*) and the several salt springs in the said Territory, together with as many contiguous sections to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land, containing a salt spring which had been discovered previous to the purchase of such tract from the United States shall be considered as fraudulent and null.

* * * * * * *

119 And the defendant to maintain the issues on its part introduced and read in evidence the depositions of Frederick H. Winston, Edwin Lee Brown, Alexander Wolcott, F. C. Meyer, Samuel G. Artingstall, William H. Wills, Lyman J. McCracken; which said depositions are as follows:

120 Also tabulated statements showing result of observations of William H. Wells and Lyman J. McCracken at Madison, Clark, Randolph, and Wells street bridges. Also depositions of F. L. Threedy, James Early, John T. Garrity, as follows.

Also tabulated statement showing the population of Chicago from 1830 to 1881, and the United States census of 1880 of Cook County, as follows.

Also section 2058 of the municipal code of Chicago dividing the city into wards, from which it appears that the south division of said city is composed of the 1st, 2d, 3d, 4th, and 5th wards; that the west division contains the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th wards; and the north division the 15th, 16th, 17', and 18th wards.

According to the U. S. census of 1880 the south division contained 127,266 inhabitants, the west division 276,321 inhabitants, and the north division 99,466 inhabitants, the west division being more than twice as large as the other two combined; that the population of Cook County in 1880 was 607,524.

121 The population of Chicago from 1830 was as follows:

1830	70
1840	4,853
1845	12,088
1850	29,963
1853	60,627
1860	112,172
1865	178,900
1870	298,977
1871 (June)	334,270

1872 (October)	364, 377
1880	503, 185
1881 (estimated)	575, 000

Defendant further introduced in evidence article VIII of chapter XV municipal code, being the bridge ordinance.

122 *Abstract of defendant's testimony.*

Mr. FREDERICK H. WINSTON, a witness for defendant, testified as follows:

I have resided in Chicago, on the north side, for about 30 years. The city is divided into three divisions, the north, south, and west, about one-half of the population being in the west division. The north division is bounded by the main river on the south and the north branch on the west; the west division by the north and south branches on the east, and the south division is bounded by the main river on the north and the south branch on the west.

The north and west divisions are for residence, with some local business, and the south division is the main business portion of the city. The south division, being the business part of the city, a very large majority of the citizens residing in the other divisions, cross the river every day in order to reach their places of business. There are no adequate means of getting from one division to another except by crossing the bridges. There is a tunnel at La Salle street, between the north and south sides, and one at Washington street, between the west and south sides. They were built by the city. They are inadequate from their steep grade; they are dark and unpleasant in their atmosphere, and very few resort to them in walking or driving; almost the entire business of the city is conducted across the bridges.

The greatest time of travel across the bridges is in the early morning, about six or seven, when laborers, men who depend upon their daily toil, cross to their work, and in the evening, about six o'clock, when they return to their homes.

123 I have lived here so long that I have a general acquaintance with the amount of business done by water and the amount of land traffic.

Q. You may make in your own way a comparison between the interests of the people in having the bridges closed and the interest of vessel owners in having them open.

A. There can be no comparison instituted between the two; the interests of the people in the city are so infinitely superior in their magnitude and importance to that of the vessel interests, there can be no comparison instituted between them at all. We have here a population, approximating from 600,000 to a million, and largely increasing every year, which use these bridges from day to day in crossing and recrossing to their homes and places of business, and the importance of their reaching their homes and places of business is so great, so immense in its character, that the interest of the vessels on the river cannot be compared to it in any respect.

(Objected to.)

Q. Can you give, in a general way, the number of men detained when

a vessel is detained by the closing of a bridge, and the number of men detained when a bridge is opening for a vessel to go through?

(Objected to as immaterial and incompetent.)

A. I should say about one in five hundred was a small proportion.

In addition to the detention of men going to and from their business, there is detained also the traffic done in teams and wagons.

Cross-examination:

I only know from observation the number of vessels which arrive and clear; I have no statistics. The tunnels are not used to any large extent, as they are steep, without light or air, and are unpleasant. They can be used, but are not, for reasons that suggest themselves to any man. If the bridges were all broken down, or open permanently, they would have to go through.

Redirect:

The bridges are used not only by those who live in the city, but also by the people of the surrounding towns, who reach the railroad depots, and have to use these bridges from day to day; they are all interested in this question. I have lived on the north side for thirty years, and cross the river some six times a day, counting both ways. The tunnels are undoubtedly unable to accommodate the traffic and travel, if they were used.

124 Recross:

More tunnels could be constructed.

EDWIN LEE BROWN, a witness for defendant, testified:

I am a manufacturer, and reside at Evanston. I have been in business in Chicago for nearly 22 years. The business portion of the city is the south side, and the people who do business there live in each of the three divisions and in the suburbs. The time of greatest travel across the bridges is, for foot passengers, in the morning from about half-past six to seven, and in the evening from six to half-past six. The tunnels are not extensively used, as they are unpleasant, damp, dark, and steep for heavy carriages and teams. If the two tunnels were used exclusively, I do not think, from my observation and judgment, that they would accommodate one-tenth of the travel and traffic.

A vessel employs perhaps half a dozen or a dozen people, and might obstruct perhaps a thousand people on the land; sometimes a thousand, and sometimes a hundred, as it happens, but a large number. In addition to the people detained on land, there is a decided damage done in the very detention of traffic and teaming. But, what would be the value of that traffic as compared with the vessel interest I could not state; itwould be mere guess-work. It is so with my own business and with all other business interests that have teaming to do.

Cross-examination:

When I say that I do not believe the tunnels could care for one-tenth of the travel and traffic, I mean that the two tunnels could not accommodate the travel which all the bridges, some twenty in number, now accommodate. A tunnel would accommodate as much travel as a bridge.

ALEXANDER WOLCOTT, a witness for defendant, testified:

I am a civil engineer and surveyor. I came to Chicago in 1834, and have lived here for 48 years. When I came here there were between 300 and 400 people here. I commenced surveying in 1838, and have been in the business ever since; have made subdivisions, laid the river, put soundings on the river for dredging, and surveyed lots for building. I have held the office of county surveyor for twenty-six years. I have known the Chicago River ever since 1834. The main river, from the forks east,
125 was then between 140 and 150 feet wide, with sloping banks. There was then an old log floating bridge across the south branch at Lake street. Prior to 1836 the main river was crossed by ferry at Fort Dearborn, where is now Rush street bridge. The main river was then about ten to twelve feet deep. To get this depth you would have to go from thirty to forty feet from each bank, so that the channel then in the main river was about eighty or ninety feet wide.

In the south branch the water was not so deep, and the width was not much over 100 feet from bank to bank. The banks were the same as in the main river, and the channel was not to exceed fifty (50) feet wide. There were no docks then.

The north branch was then considered nothing but a slough, as it was named in the government survey. The south fork of the south branch was merely a slough. The north branch, where it intersected the main river, had about six feet of water, and ran to three feet just south of Chicago avenue.

The Chicago River and its branches lie wholly in the State of Illinois.

Q. You may state, in a general way, what has been done with the river and its branches since that time by the city and by the citizens.

(Objected to.)

A. The citizens have docked the south branch and the north branch and also the main river; the city has done the dredging.

The docking has been done under the direction of the city; the contracts let by the city. The river has been widened and deepened to its present width and depth by the city and the citizens under its directions.

The bridges over the river are swing bridges, swung by a lever on a pivot by men on the bridge, and over a protection in the centre of the river. The protection is from 24 to 30 feet wide, depending on the width of the bridge. It is longer than the bridge in order to protect it from collisions. This is necessary, otherwise the bridge might be injured or knocked off its pivots. The abutments on the shore opposite the bridge generally extend into the river some 12 or 15 feet.

The pier on which Harrison street bridge rests was originally about two-thirds across the river. Since then the city has condemned 72 feet on the west side of the river, and widened the river that width. I made the survey for it, and know that the city did the work. The effect of it was to widen the river so that vessels could get on both sides of the protection; before they could only pass one.

126 (Witness identifies map of south branch, as it existed in 1821.) Defendant introduces same in evidence, and also map, certified to by the Secretary of War.

On the map of the original south branch the outer dotted line is the meander line, and the inner line is the water line. The meander line is

taken from point to point by the surveyor, and the inner, or water line, is generally about 20 feet inside the meander. The distances marked on this map are from the water line on one bank to the water line on the other. The channel would be about half this distance, may be a little more. A ten-foot channel at Harrison street would be about 50 feet wide. The channel would average about 25 feet from each bank, and in order to get the channel from this map you must deduct twice 25 feet, or 50 feet, from the distance given from bank to bank.

The place marked Fort Dearborn, on the War Department map, corresponds to what is now Rush street bridge. The place marked Dr. Wolcott's house was my uncle's house, and was 70 or 80 feet west of what is now State street.

Cross-examination:

The streets and bridges are not shown on the government survey.

The distances marked on the map between the water lines were estimated from what I know of the river, and were not taken from actual measurement. The main river below Rush street was originally between 12 and 15 feet in depth. In 1858 I took the sounding of the river for the city, on the main river, the north branch and the south branch, as far as Polk or Twelfth street. There is more depth now than then. Vessels drawing 10 to 12 feet of water could not have crossed the bar of the harbor as early as 1844. The south fork of the south branch was not a navigable stream in 1834, but it is to-day. The government called the river navigable up to the junction of the north and south branches, and it was from 6 to 15 feet deep in 1834. The government never meandered the north branch.

I was city surveyor in 1858–'9, and I made the estimates for the dredging that year. These estimates were destroyed by fire, and I testify from my recollection. The dredging was mostly in the center of the river and its branches; most of it on the north branch. The north branch, at its mouth and at Chicago avenue, was 6 feet deep, and was dredged to 12 feet, uniform depth. Dredging was also done on the main river, all the
127 way from the end of the south pier, west up the river. The dredging on the south branch was between Harrison street and the main river, and was to 12 feet depth. The material dug up by the dredges was clay, with some debris washed in. The north end of Rush street bridge would be about 200 feet west of the letter C on the government map, and its south end about 50 or 60 feet from the letter A.

Redirect:

The meander line in river surveys is from 15 to 30 feet from the shore, so that being given the meander, I can approximate the shore line.

F. C. MEYER, a witness for defendant, testified:

I am bookkeeper for the department of public works of the city of Chicago, and have charge of its books.

The books of this department were saved from the fire. The total amount paid for dredging, docking, use of tugs, scows, labor and material on the Chicago River, as shown by the books, from 1861 to 1882, is $785,191.34.

(Objected to.)

The total amount paid for dock-line surveys is $33,616.17. The amount paid for north pier extension from 1864 to 1866, was $135,224.38. The amount paid by the city for land damages, widening the river, from 1863 to 1877, was $196,436.32. There were land damages paid at Adams street, Polk street, Van Buren street, Harrison street, Wells street, and I think 22d street. The council appropriated in 1874 $25,000, and in 1876 $13,000 for widening the river at Harrison street bridge, which was all expended except $18,844.13.

Cross-examination:

I have taken these figures from the books required by law to be kept by the department, and what I have testified to is not of my own knowledge. These books are in existence, and I made such computation from them as I was directed.

SAMUEL G. ARTINGSTALL, a witness for defendant, testified:

I have been an engineer for the past 20 years, and now hold the position of city engineer. I have designed and constructed bridges, and have a general knowledge of them. I consider the bridges over the Chicago River and its branches the best kind for the situation; they are
128 the easiest handdled, and, all things considered, cause less obstruction to the river and to land travel. They are simply a long platform supported in the centre on a pivot and bearing wheels. They are swung by manual power, and are protected by a pile protection in the centre of the channel. The protection is generally 3 to 4 feet wider than the bridge, the bridges being generally about 28 feet wide. The ends of the bridges are supported on an abutment at each end when closed.

Harrison street bridge is 165 feet long. The protection is 33 to 34 feet wide, leaving a channel on each side 66 feet wide in the narrowest part. At this bridge an additional channel was excavated by the city about 56 feet wide, where there was but one before.

Twelfth street bridge is 203¼ feet long, with a protection 34¾ feet wide; the narrowest point of the channel here is 70 feet wide on each side.

Eighteenth street bridge is 179 feet long, with a protection about 35 feet wide.

Twenty-second street bridge is 211¼ feet long, with a protection of 35 feet. This bridge, being on a line with the street, crosses the river diagonally, and there is only one channel here. It is 56 feet wide at its narrowest point.

Halsted street bridge is 153 feet long, with a protection 33 feet wide; the channel is 46 or 47 feet wide on each side.

Main street bridge is 153½ feet long, with a protection 34 feet wide; the channel is 47 feet wide on one side, and 45 feet wide on the other, at the narrowest points.

Fuller street bridge is 127 feet long, with a few piles for protection; the channel here is 50 feet wide, and there is but one.

Archer avenue bridge is 155 feet long, with a protection 34 $\frac{8}{10}$ feet wide; the channel on each side is 58 feet wide.

Douglas avenue bridge is 141½ feet long, with a protection 23¾ feet wide. The channel here is 58 feet wide at the narrowest point. There are two, one having been dug lately by the Robbins estate.

Ashland avenue bridge is 142½ feet long, with a protection 26 8/10 feet wide; the channel is 52½ feet wide. There is but one, as the other has not depth of water enough.

Polk street bridge is 155 feet long, with a protection 33 feet wide; there are two channels, each 52½ feet wide.

129 The above are all the city bridges from Harrison street south on the south branch and the south fork of the south branch. The abutments project into the river for the purpose of allowing vessels to lie at the docks on each side.

It has always been the policy of the city to so build the bridges that they should interfere as little as possible with navigation.

Cross-examination:

When I speak of the narrowest point in the channel of these bridges, I mean the shortest distance between the abutment and the protection. The narrowest point at Harrison street bridge is 55 or 60 feet; at Twenty-second street bridge, about 54 feet; at Eighteenth street bridge, 65 or 66 feet, with but one channel; at Twelfth street, 72 feet; at Harrison street, 62 feet. The width of the river at Harrison street is 160 feet at one end, the north end, and 180 feet at the south end; this is divided into the protection, 34 feet; the west channel, 65 feet; and the east channel, 83 or 84 feet. The north end of the bridge protection extends 75 feet past the north line of Harrison street extended across the river. Opposite the ends of the protection the banks of the river are occupied on the west side by a coal yard; on the east side by a stone yard. The banks are not occupied by the city. The south end of the bridge protection extends 75 feet beyond the south line of said Harrison street, and on the east bank of the river, opposite that 75 feet, is a stone yard, and on the west side, up to within a month, there was a lumber yard, but I understand now they are going to use it as a coal yard. It is not owned or occupied by the city on either side.

Between 150 and 200 feet north of the north end of the bridge protection at Harrison street there is a narrow point in the river, narrower than at the bridge. I can give the distance of the width at that point as nearly as other distances I have given. It is about 137 feet, and that point is about 160 or 165 feet from the north end of the protection.

For the past six years I have designed bridges for the city, among them Harrison street bridge. I have designed and constructed a good many swing bridges. I have examined bridges opened and closed by steam at Keokuk, at Quincy, and at Atchison. For such short spans as we have at Chicago, I consider manual power the best for bridges. I don't think the time of opening and closing could practically be shortened by the use of steam in the case of these short bridges. I know of no case

130 where bridges as short as these are operated by steam. Considering all the points, I do not think it is possible to construct bridges which would less obstruct the navigation of the Chicago River than those we have. I have timed some of the bridges. It takes from a minute and a half to three minutes to open or close. It sometimes takes three minutes to open a bridge, and about the same length of time to close. I do not know that a bridge as long or longer than any across the Chicago River can be opened and closed by the aid of steam and let a vessel pass

through in a minute, but don't know but what it can be done. I never examined the steam bridges at Cleveland. I don't think it practicable to use steam on our bridges.

Redirect-examination:

The protection is for the purpose of protecting the bridges from damages by vessels when it is swung in the middle of the river, and for that reason is a little longer and wider than the bridges.

WILLIAM H. WILLS, a witness for defendant, testified:

I was employed by the Citizens' Association to make a computation of the amount of travel over certain bridges.

The great majority of the vehicles that cross the bridges are business teams. The bridges are most used in the morning from six to half-past seven, and in the evening from half-past four to seven. The men who pass in these hours are working men and business men. In the evening the travel flows north and west from the South Side.

Opening a bridge causes a blocking of teams not only on the street leading to the bridge, but also on the cross streets. The railroad depots are distributed in the different divisions of the city.

Cross-examination:

Of the people detained by the bridges when open, some would be detained the whole time, and some would come up while it was open or was closing. The shortest time in which Randolph street bridge was opened and closed was a minute and a half; Wells street bridge, in two minutes. The average number of persons detained in the tables was obtained by dividing the whole number detained by the total number of detentions.

131 LYMAN J. MCCRAKEN, a witness for defendant, testified:

I was employed by the Citizens' Association to make a computation of the amount of travel over certain bridges.

The count of Madison street and Clark street bridges was made last year before this suit was begun.

The bridges are most crowded from half-past five to seven in the evening with people going home.

Defendant introduced in evidence the tabulated statements showing the result of the observations of the witnesses, Wills and McCracken, at Madison street bridge, at Clark street bridge, at Randolph street bridge, and at Wells street bridge, as follows:

AT THE MADISON STREET BRIDGE.

On June 18, 1881, the report is as follows, weather cool and fair, shower in the afternoon:

	Foot passengers.	Horse cars.	Other vehicles.
Going east	6,800	700	2,260
Going west	7,250	760	1,945

Bridge open, times, 45.

Vessels passed: Steam, 32; sail, 50.

Randolph street bridge being broken, was not used this day.

CLARK STREET BRIDGE.

From 6 o'clock a. m., until 7 o'clock p. m., June 16, 1881; weather warm and clear:

	Foot passengers.	Horse cars.	Other vehicles.
Going south	8,820	410	1,955
Going north	7,079	394	1,806

Bridge open, times, 56.
Vessels passed: Steam, 22; sail, 92.

The greatest number of persons detained going south was 290, in the morning, between 6 and 7 a. m., 5 cars and a large number of vehicles; and the greatest number of persons detained going north was 244, at 5.30 p. m. Average detention at other times, 75 persons. Average time of drawing the bridge, 6 minutes; greatest time, 9 minutes.

132 *Observations taken at Wells street bridge, going south, April 18, 1882.*

Time.	Pedestrians.	Vehicles.	Street cars & loaded omnibuses.	Bridge opened.	Vessels passed.	
					Steam.	Sail.
5.30 to 6	194	20	2	4	4	.....
6 " 7	2,415	77	10	.....	.....	.....
7 " 8	1,860	97	35	3	1	1
8 " 9	1,215	211	20	1	1	.....
9 " 10	960	223	19	.....	1	.....
10 " 11	660	203	21	.....	.....	.....
11 " 12	450	176	14	2	1	2
12 " 1	295	69	11	1	.....	1
1 " 2	475	110	19	2	.....	2
2 " 3	425	130	21	1	.....	2
3 " 4	625	133	16	4	2	7
4 " 5	305	161	11	5	5	4
5 " 5.30	120	50	10	2	1	2
5.30" 6.30	200	50	15	1	1	.....
6.30" 7	160	29	7	2	.....	3
Total	10,269	1,739	233	28	17	24

NOTES.

No omnibuses were counted in the 4th column unless they contained more than 5 passengers.

Total number of pedestrians detained during the day was 1,551
And vehicles 385

The greatest number detained at one time was 300 on foot and 30 vehicles, going south.

The average number of pedestrians detained was 56.

The average number of vehicles detained was 14.

The average time of detention was 5 minutes.

W. H. WILLS.

133 *Observations taken at Wells street bridge, going north, Tuesday, April* 18, 1882.

Time.	Pedestrians.	Vehicles.	Street cars & loaded 'buses.	Bridge opened.	Vessels.	
					Steam.	Sail.
5½ to 6	50	5	15	4	4	.....
6 " 7	500	80	10	.....	.....	.....
7 " 8	310	128	15	1	1	1
8 " 9	420	200	15	1	1	.....
9 " 10	550	200	10	.....	1	.....
10 " 11	550	225	25	.....	.....	.....
11 " 12	910	300	10	2	1	2
12 " 1	200	80	10	1	.....	1
1 " 2	350	140	13	2	.....	2
2 " 3	550	260	15	1	.....	2
3 " 4	700	210	15	4	2	7
4 " 5	900	240	9	5	5	4
5 " 5½	600	100	13	2	1	2
5½ " 6½	3,060	160	20	1	1	.....
6½ " 7	850	88	.....	2	.....	3
13½ hours	10,500	2,416	195	28	17	24

NOTES.

None but full 'busses were counted with horse-cars.

Total number of pedestrians detained 1,350
Greatest " " " " 250
" " " vehicles " 50
Average " " " " 15
" " " pedestrians " 50

Longest time of detention, 9 minutes.
Busses and H. R. R. cars average at 12.
Total 2,340

Weather cool; light clouds, and very light shower at 7.15 p. m.

L. J. McCRAKEN.

134 *Observations taken at Randolph street bridge, April* 21, 1882, *going east.*

Time.	Pedestrians.	Vehicles.	Street cars.	Bridge opened.	Vessels passed.	
					Steam.	Sail.
5.30 to 6 a. m	150	3	5	1	1	.....
6 " 7 "	580	25	42	.....	.....	.....
7 " 8 "	630	120	51	3	3	3
8 " 9 "	380	176	60	1	.....	1
9 " 10 "	380	180	53	3	2	4
10 " 11 "	360	120	43	4	.....	6
11 " 12 "	260	70	30	3	.....	3
12 " 1 p. m	280	60	39	3	.....	3
1 " 2 "	220	36	30	4	.....	4
2 " 3 "	230	80	45	3	.....	6
3 " 4 "	300	94	52	4	4	3
4 " 5 "	220	120	51	6	2	12
5 " 5.30 p.m	190	54	22	3	2	7
5.30 " 6.30 "	220	90	85	.....	.....	.....
6.30 " 7 "	226	7	33	2	1	8
Totals	4,626	1,234	643	40	15	60

Total number of pedestrians detained during day 875
Total number of vehicles detained during day..... 373
The greatest number of pedestrians at one time was at 7.15 o'clock... 90
Vehicles 26
The average number of pedestrians detained..... 22
The average number of vehicles detained..... 10
The average time of detention, 5 minutes.
The greatest time of detention, 9 minutes.

W. H. WILLS.

135 *Randolph street bridge, April 21st, 1881, going west.*

Time.	Pedestrians.	Vehicles.	Street cars.	Bridge opened.	Vessels passed.	
					Steam.	Sail.
5.30 to 6 a. m	50	3	1	1	1	.....
6 " 7 "	150	15	33	.....	.....	.....
7 " 8 "	150	45	55	3	3	3
8 " 9 "	130	113	76	1	.....	1
9 " 10 "	300	118	62	3	2	4
10 " 11 "	300	180	60	4	.....	6
11 " 12 "	300	177	40	3	.....	3
12 " 1 p. m	220	88	35	3	.....	3
1 " 2 "	260	140	51	4	.....	4
2 " 3 "	130	116	40	3	.....	6
3 " 4 "	350	190	61	4	4	3
4 " 5 "	400	172	70	6	2	12
5 " 5.30 p. m	200	75	48	3	2	7
5.30 " 6.30 "	2,275	385	114	.....	.....	.....
6.30 " 7 "	270	48	50	2	1	8
Total	5,485	1,865	796	40	15	60

NOTES.

Weather clear, chilly, northeast breeze.

	Pedestrians.	Vehicles.
Largest detention	40	50
Average	15	16
Average bridge-opening	5 minutes.	
Quickest bridge-opening	2 "	

It was opened and closed twice in seven minutes, and 38 teams passed in the interim.

Total number of H. R. R. cars, 796, est'd @ 20, 15,925.

Lake street bridge closed to teams at 5½ p. m.

L. J. McCRAKEN.

136 F. L. THREEDY, a witness for defendant, testified:

I am assistant superintendent of the North Chicago City Railway. That company runs cars across Wells street bridge, Clark street bridge and State street bridge. Across Wells street bridge our cars run 3 minutes apart; across State street bridge they run 4 minutes apart; across Clark street bridge from 6 a. m. to 4.30 p. m. they run 1¾ minutes apart. From 3.30 p. m. to 7 p. m. ten additional cars are put on and there is only a minute's difference between the cars.

On April 24th I counted the number of passengers carried in our cars over Clark street bridge, in the morning between 6 and 7, and in the evening between 5.30 and 6.30. We carried 1,400 going south, between 6.30 and 7 a. m. We carried 2,270 going north, between 5.30 and 6.30 p. m.

April 25th I counted at State street. Between 6.30 and 7 a. m. 180 were carried south, and 689 were carried north between 5.30 and 6.30 p. m. Those who go south between 6.30 and 7 a. m. are mostly laboring men. Our busiest time in the morning is between 6.30 and 8 o'clock, carrying people south; in the evening, between twenty minutes to 6 and 25 minutes past six, carrying them north.

Before the passage of the bridge ordinance we often had complaints from laborers, who said the cars didn't come early enough, and they got bridged, were late to their work, and thus lost a quarter of a day's wages. They would start for their work at a quarter to seven in the morning, would be delayed by the opening of the bridge, and would reach their work after seven o'clock. They would then have to lie off until nine o'clock and lose a quarter of a day's wages. The opening of Clark street bridge for ten minutes during the hour between 5.30 and 6.30 p. m. would delay about 500 people in the street cars alone.

Cross-examination:

All I know about the wages of laborers being docked on account of their being late is from the complaints made to me. I have no personal knowle lge on that point.

JAMES EARLY, a witness for defendant, testified:

I am a police officer and was detailed May 1st to count the number of horse cars that passed Madison street bridge going east between 6 and 7 a. m., and going west between 5.30 and 6.30 p. m.

136½ Also a map drawn on the same scale as the War Department map, showing the present condition of the main Chicago River.

Also a map on the same scale as the map of 1821, showing the present condition of the south branch and the south fork of the south branch of the Chicago River.

Also a map showing the depth of the Chicago River and its branches.

Also a map of the main Chicago River, and a map of the south branch thereof, as they were in their natural condition.

137 In the morning hour 51 cars passed going east, and in the evening hour 84 passed going west.

The West Side Railway Company run cars across Lake, Randolph, Madison, and Van Buren street bridges.

Cross-examination:

I think most cars run across Madison street bridge, although on Randolph street there are four lines and on Madison street but three.

JOHN T. GARRITY, a witness for defendant, testified:

I am a police officer, and on May 1st I was detailed to count the number of passengers carried across Madison street bridge, going east between 6 and 7 o'clock a. m. and going west between 5.30 and 6.30 p. m.

In the morning hour each car going east averaged 26 passengers, and the 51 cars carried 1,326 passengers.

In the evening hour each car going west averaged 42½ passengers, and the 84 cars carried 3,549 west between 5.30 and 6.30 over Madison street bridge.

The defendant introduced in evidence a map, drawn on the same scale as the War Department map, showing the present condition of the main Chicago river.

Also a map, on the same scale as the map of 1821, showing the present condition of the south branch and the south fork of the south branch of the Chicago River.

Also a map showing the depth of the Chicago River and its branches.

Defendant also introduced in evidence a tabulated statement, showing the population of Chicago from 1830 to 1881, and the United States census of 1880 of Cook County, showing the population of Chicago by wards.

Defendant further introduced in evidence section 2058 of the municipal code of Chicago, dividing the city into wards.

From this it appears that the south division of said city is composed of the 1st, 2d, 3d, 4th, and 5th wards; that the west division contains the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th wards, and the north division the 15th, 16th, 17, and 18th wards.

138 According to the U. S. census of 1880, the south division contained 127,266 inhabitants, the west division 276,321 inhabitants, and the north division 99,466 inhabitants, the west division being more than twice as large as the other two combined.

That the population of Cook County in 1880 was 607,524.

The population of Chicago from 1830 was as follows:

1830	70	1865	178,900
1840	4,853	1870	298,977
1845	12,088	1871 (June)	334,270
1850	29,963	1872 (October)	364,377
1853	60,627	1880	503,185
1860	112,172	1881 (estimated)	575,000

Defendant further introduced in evidence Article VIII of Chapter XV, Municipal Code, being the bridge ordinance.

139 The foregoing was all the evidence introduced on the trial of this cause by either party.

And because none of the matters aforesaid otherwise appear, the complainant prays that this his certificate of evidence may be signed, sealed, and made a part of the record, and it is done accordingly.

H. W. BLODGETT, *Judge*. [SEAL.]

(Endorsed:) Filed July 7, 1882. Wm. H. Bradley, clerk.

140 Afterwards, to wit, on the twenty-fourth day of July, in the July term of said court, A. D. 1882, in the record of the proceedings thereof in said-entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO. } In chancery.

Now come the parties, by their solicitors, and the complainant, by Mr. Upton, his attorney, prays an appeal herein to the Supreme Court of the United States, which is hereby allowed upon his giving bond in the sum of five hundred dollars, to be approved by the clerk.

Afterwards, to wit, on the second day of August, A. D. 1882, there was filed in said clerk's office a stipulation in said-entitled cause, which said stipulation is in the words and figures following, to wit:

141 It is stipulated that the clerk in making up the record shall copy as follows, to wit, for complainant:

Deposition of Ira H. Owen.

(Omit jurat at foot of p. 7, caption p. 8, and commence p. 9, redirect examination of Ira H. Owen.)

Deposition of A. E. Goodrich.

Depositions of—

R. W. Hayes,	as given on				pages	22 & 23,	printed abstract.	
T. G. Butlin,	"	"	"	"		25 & 26,	"	"
Thomas Johnson,	"	"	"	"		26 & 27,	"	"
Stephen Green,	"	"	"	"		27,	"	"
Peter Peterson,	"	"	"	"		27 & 28,	"	"
John Sweeney,	"	"	"	"		28,	"	"
John O'Grady,	"	"	"	"		29,	"	"
John Keelin,	"	"	"	"		29,	"	"
Fay Nyman,	"	"	"	"		29 & 30,	"	"
James McIlwee,	"	"	"	"		30 & 31,	"	"
Charles N. Myers,	"	"	"	"		31 & 32.		
William Harman, J. A. Crawford, Andrew Green, Andrew Wilson, James L. Higgie, Geo. W. Hotchkiss, Thos. L. Parker, Walter G. Kircheval, Robert Clidesdale, Joseph C. Perrett,	from 32 to 39, printed abstract.							
John B. Warren,	"	"	"	"		39,	"	"
George E. Merritt,		"	"	"		39, 40, & 41.		
J. G. Lydecker,		"	"			41 & 42.		
W. T. Spencer,		"	"			42 & 42½.		

Certificates of license and of enrollment of propellor Escanaba.

142 Redirect:

Complainant offered in evidence map certified by Secretary of War, dated Nov. 29th, 1881, and also map of township 39 north, range 14 east, 3rd p. m.

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In the evening hour each car going west averaged 42½ passengers, and the 84 cars carried 3,549 west between 5.30 and 6.30 over Madison street bridge.

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Stephen Green,	"	"	"	"		27,	"	"
Peter Peterson,	"	"	"	"		27 & 28,	"	"
John Sweeney,	"	"	"	"		28,	"	"
John O'Grady,	"	"	"	"		29,	"	"
John Keelin,	"	"	"	"		29,	"	"
Fay Nyman,	"	"	"	"		29 & 30,	"	"
James McIlwee,	"	"	"	"		30 & 31,	"	"
Charles N. Myers,	"	"	"	"		31 & 32.		
William Harman, J. A. Crawford, Andrew Green, Andrew Wilson, James L. Higgie, Geo. W. Hotchkiss, Thos. L. Parker, Walter G. Kircheval, Robert Clidesdale, Joseph C. Perrett,	from 32 to 39, printed abstract.							
John B. Warren,	"	"	"	"		39,	"	"
George E. Merritt,		"	"	"		39, 40, & 41.		
J. G. Lydecker,		"	"			41 & 42.		
W. T. Spencer,		"	"			42 & 42½.		

Certificates of license and of enrollment of propellor Escanaba.

142 Redirect:

Complainant offered in evidence map certified by Secretary of War, dated Nov. 29th, 1881, and also map of township 39 north, range 14 east, 3rd p. m.

Also the annual report of the trade and commerce of Chicago, compiled for board of trade by Charles Randolph, secretary.

Also such portions of the following acts of Congress as show appropriations for improving the harbor at Chicago, found in vol. 4, U. S. Statutes at Large for 1831–'3–'4–'5, on pages 491, 645, 703, 754; and for 1836–'7–'8–'43–'4, in vol. 5, pages 67, 187, 268, 619, and 662; and for 1852, in vol. 10, page 58; and for 1866, vol. 14, page 72; for 1870, vol. 16, page 226; for 1872–'3, vol. 17, pages 370, 560; for 1874 and '5, vol, 18, pages 237 and 456; for 1876, vol. 19, page 134; for 1878 and '9, vol. 20, pages 156 and 368; for 1881, vol. 21, page 471.

Also act of Congress defining district of Michilimackinac, found in vol. 1, U. S. Statutes at Large, p. 638.

Also sec. 8 of act passed June 30th, 1834, vol. 4, page 716, establishing ports of entry.

Also act passed July 16, 1846, vol. 9, p. 38, establishing district of Chicago.

Also act of Illinois, passed Feb. 14, 1852, found in Session Laws of Ills. for 2d sess. of 1849 and 1851, p. 147, defining the extent of Chicago Harbor.

Also act of May 18, 1796, sect. 9, found in vol. 1, U. S. Statutes at Large, p. 468, authorizing sale of public lands.

Also sect. 6 of act of March 26, 1804, found on page 279, vol. 2, U. S. Statutes at Large, authorizing sale of public lands.

143 EVIDENCE ON BEHALF OF DEFENDANT.

Depositions of—

Frederick H. Winston,	as on p. 43 & 44, printed abstract.
Edwin Lee Brown,	45,
Alexander Wolcott,	45 to 48,
F. C. Myer,	48,
Saml. G. Artingstall,	48 to 50,
Wm. H. Wills,	51,
Lyman J. McCraken,	52,
Observations by Wills,	53 & 55,
" " McCraken,	54 & 56,
Deposition of F. L. Threedy,	57,
James Early,	57 & 58,
John T. Garrity,	58,

Tabulated statement showing population of Chicago and Cook Co., 58.
Section 2058 of municipal code, 58 & 59.
Article 8, chapter 15, municipal code.

It is further stipulated that either party may direct the inserting in the record in full of all or any portion of any ordinance or statutes offered in evidence by either party.

F. S. WINSTON, JR.,
For Defendant.
COOK & UPTON,
For Complt.

AUGUST 2ND, 1882.

(Endorsed:) Filed August 2, 1882. Wm. H. Bradley, clerk.

144 Afterwards, to wit, on the fourth day of August, A. D. 1882, came the complainant and filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, the Escanaba and Lake Michigan Transportation Company, a corporation organized and existing under the laws of the State of Michigan, and of the county of Cook, and State of Illinois, are held and firmly bound unto the city of Chicago, also of the same county and State, in the penal sum of five hundred dollars lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents. Witness our hands and seals this day of , A. D. 1882.

The condition of the above obligation is such that, whereas the said city of Chicago did, on the seventh day of July, A. D. 1882, in the
145 United States circuit court of the northern district of Illinois aforesaid, and of the July term thereof, A. D. 1882, recover a judgment against the above bounden the Escanaba and Lake Michigan Transportation Company, for costs of suit, from which said judgment of the said United States circuit court of northern district of Illinois the said Escanaba and Lake Michigan Transportation Co. have prayed for and obtained an appeal to the Supreme Court of the United States:

Now, therefore, if the said Escanaba and Lake Michigan Transportation Company shall duly prosecute its said appeal with effect, and moreover pay the amount of the judgment, costs, interest, and damages, rendered and to be rendered against it in case the said judgment shall be affirmed in said Supreme Court, then the above obligations to be void; otherwise to remain in full force and virtue.

ESCANABA AND LAKE MICHIGAN TRANS. CO., [SEAL.]
IRA H. OWEN, *Treasurer.* [SEAL.]
A. G. VAN SCHAICK. [SEAL.]

Bond approved.

WINSTON, *for City.*

Approved.

WM. H. BRADLEY, *Clk.*

Filed this 4th day of August, A. D. 1882. Wm. H. Bradley, clerk.

146 On the same day, to wit, on the fourth day of August, A. D. 1882, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States for the northern district of Illinois.

THE ESCANABA AND LAKE MICHIGAN TRANSportation Company
vs.
THE CITY OF CHICAGO. } In chancery.

It is hereby stipulated and agreed that the several maps and plats introduced by either party on the hearing of above-entitled cause, also the map accompanying the report of the witness J. G. Lydecker, and the diagrams and so much of his report and the report of Major Gillespie as is mentioned and referred to by said Lydecker in his examination, and as was offered in evidence on said hearing, may be ordered by the
147 court to be sent up to the Supreme Court of the United States, also the board of trade annual report for 1881, as original documents or evidence in addition to the copy of the record and in lieu of a part thereof.

Dated August 4th, 1882.

F. S. WINSTON, JR.,
For Defendant.
COOK & UPTON,
For Compl't.

(Endorsed:) Filed August 4, 1882. Wm. H. Bradley, clerk.

148 Afterwards, to wit, on the ninth day of October, in the adjourned October term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE ESCANABA AND LAKE MICHIGAN TRANSportation Company
vs.
THE CITY OF CHICAGO. } In chancery.

And now, on this day, come the parties to the above-entitled cause, by their respective solicitors, and by stipulation of parties it is ordered by the court that the clerk of this court transmit to the Supreme Court of the United States the original maps, plats, and reports introduced on the hearing of above cause along with and as part of the record and transcript in this cause, and in addition thereto and in lieu of a part thereof as follows: A may certified by Secretary of War, his certificate dated Nov. 29th, 1881, and marked "Complainant's Exhibit No. 1."

149 Also a map of fractional township No. thirty-nine (39) north of the base line, range No. 14 east of the 3d p. m., certified to by W. W. H. Lawton, custodian United States surveys, and marked "Complainant's Exhibit No. 2."

Also, the map marked "Exhibit A, deposition of Lydecker," accompanying the report of G. J. Lydecker, captain of engineers, U. S. A., being appendix B B of the annual report of the Chief of Engineers for 1879, and the diagrams and so much of his report, which report is marked "Complainant's Exhibit No. 3," and the report of G. L. Gillespie, major of engineers, being appendix T of the annual report of the Chief of Engineers for 1876, and marked "Complainant's Exhibit No. 4," as is mentioned and referred to by said Lydecker in his examination in said cause.

Also, the 24th annual report of the trade and commerce of Chicago, for the year ending Dec. 31, 1881, compiled for the board of trade, by Charles Randolph, secretary, marked "Complainant's Exhibit No. 5." All of which were introduced on behalf of complainant and the hearing of above cause.

Also, the following maps, which were introduced by the de-
150 fendant on the hearing of said cause:

Map showing width of the south branch of the Chicago River in its natural condition, marked "Defendant's Exhibit No. 1."

Maps showing width of said south branch in its present condition, marked "Defendant's Exhibit No. 2."

Map of the city of Chicago, by the U. S. engineers, marked "Defendant's Exhibit No. 3."

By consent of the parties, it is further ordered that this order be entered nunc pro tunc as of the fourth day of August last.

151 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein the Escanaba and Lake Michigan Transportation Company is the complainant and the City of Chicago is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-sixth day of September, A. D. 1882.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 1057. The Escanaba and Lake Michigan Transportation Company, appellant, vs. The City of Chicago. N. Illinois C. C. U. S. Filed 13th October, 1882.

OFFICE SUPREME COURT U.S.
FILED
JAN 6 1883
JAMES H. McKENNEY, Clerk
17-698

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1882.

No. 1057.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY

vs.

THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF and ARGUMENT for APPELLANT.

A. T. BRITTON,
J. H. McGOWAN
AND
HOMER COOK,
SOLICITORS FOR APPELLANT.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1883.

IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

No. 1057.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY,
vs.
THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

STATEMENT OF THE CASE.

This is a suit by a bill in equity, exhibited against the city of Chicago in the court below on the 28th day of November, 1881, seeking to enjoin it from obstructing the free navigation of the Chicago river by closing all bridges over the same for an hour at a time, twice each day, and also seeking to have certain of said bridges, and the piers on which they rest, and all of them when so closed, declared to be nuisances, and abated as such.

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The bill shows that the Chicago river and its branches are navigable waters leading into Lake Michigan, and are, and for a long time have been, common public highways, free to all the inhabitants of the United States. That the north and south branches unite within the limits of the city, and form the main branch, which then flows easterly three-fourths of a mile into Lake Michigan; that the city, extending from the lake, lies upon each side of the main river and upon each side of said branches; that the south branch, and the south fork of the south branch, are navigable to and beyond the southern, and the north branch to and beyond the northern city limits: (Printed Record, fol. 2.)

That along said river and its branches are numerous docks, wharves, landings, lumber yards, coal yards, wood yards, etc., and numerous grain elevators, warehouses and storehouses, at which vessels receive and discharge large amounts of freight of all kinds; that at various places on the banks of said river and its branches there are branch railroad tracks, connecting with the main lines of divers railroads leading from said city into the interior of the said State of Illinois and other states, and that large amounts of freight are delivered from such vessels upon the river, into and upon the freight cars placed and standing upon said branch tracks, to be thence transported over said railroads; that many citizens of various states are, and for a long time have been, accustomed to navigate said river and its branches with vessels, and to pass along the same into and out of Lake Michigan, and across the same, and into and along said lake to and from other navigable waters, transporting passengers and large quantities of lumber, wood, coal, iron ore, etc., and other goods in such vessels from ports outside of Illinois, and deliver-

ing the same at said docks, yards, warehouses, railroad cars, etc., along said river and its branches, and also carrying large quantities of grain, provisions and other goods, etc., from said grain elevators, docks, cars, etc., to places of destination outside of said state, thereby conducting an extensive and valuable trade and commerce between the said city of Chicago and many other ports in other states on said Lake Michigan and other navigable waters connecting therewith; that the appellant owned three steam propellers, of upwards of eleven hundred tons burden each, which were employed in commerce and navigation between the ports of Escanaba, in the State of Michigan, and the docks of the Union Iron and Steel Company, on the south branch, and the south fork of the south branch of the Chicago river, at a point up the river four miles from the mouth of the main branch, transporting iron ore from Escanaba to the said docks within the interior of the said city of Chicago, and delivering the same to said company; that said steam propellers were duly enrolled and licensed for the coasting trade at Port Huron, and hailed from Marine City, in the State of Michigan, that being their home port. (Printed Record, fol. 3 and 4.)

The bill further alleges that the city of Chicago has at many places within its limits, built, and now maintains bridges across said river and the said branches, and describes the location of the said bridges. That said bridges are constructed with draws so as to be opened to permit vessels to pass; that they are supported upon piers erected in the center of the channel of the river, and rest upon turn-tables on said piers, upon which they are swung from the center so as to open and leave a channel on each side of said piers; that said channels at some of the bridges are of sufficient width to permit vessels to

pass without material obstruction when the bridges are not closed; but that at other bridges, owing to the width of the river, and the existence of the piers in the center the channels upon each side of the piers are not of sufficient width to permit a free and safe passage for many of the large class of vessels, and that several of the largest class navigating the river, are too wide to pass through said channels at all; that the said piers, in the center of the river, extend a distance of from 130 to over 200 feet, along the center of the river, being of considerable greater length than the respective bridges which rest thereon, and are permanent obstructions to free navigation. (Printed Record, fol. 5.)

That said piers divide the river into two narrow channels, considerable less in width than was one-half of the original channel; that the piers being from thirty to forty feet wide, occupy and permanently obstruct that much in width of the best navigable portion of the river; that the land on the banks of said river lying opposite these bridge piers, except the portions occupied for streets, is private property, used by individuals and corporations for docks, wharves, lumber, coal, wood and stone yards, grain elevators, mills, warehouses, &c., and that vessels are rightfully accustomed to discharge and take on freight thereat, and while doing so, occupy a portion of said narrow channels, and while doing so, a very large number of vessels navigating the river are unable to pass, when, were it not for the existence of said piers, they could safely do so; that at Harrison street bridge the navigation is so obstructed by the center pier that no two ordinary sized vessels can pass each other for the length of the pier, which is over 120 feet.

That the city of Chicago causes all the bridges to be

closed from six to seven o'clock in the morning of each day, and also to be closed from half-past five to half-past six o'clock in the afternoon; that the common council of the city has passed an ordinance which remains in full force in said city, a copy of which is attached to the bill as Exhibit "A," and is as follows: (Printed Record, fol. 6.)

"EXHIBIT A.

"Be it ordained by the city council of the city of Chi-
"cago, as follows:

* * * * * * *

"ARTICLE VIII.

"BRIDGES.

* * * * * * &

"SEC. 984. Between the hours of six and seven o'clock
"in the morning, and half-past five and half-past six
"o'clock in the evening, Sundays excepted, it shall be un-
"lawful to open any bridge within the city of Chicago."
(Printed Record, fol. 10.)

That another ordinance was in force regulating the opening and closing of bridges between seven o'clock in the morning and half-past five in the afternoon, a copy of which is attached to the bill as Exhibit "B," and is as follows:

"EXHIBIT B.

"Be it ordained by the city council of the city of
"Chicago, as follows:

* * * * * * *

"ARTICLE VIII.

"BRIDGES.

* * * * * * *

"SEC. 985. During the hours between seven o'clock
"in the morning and half-past five o'clock in the evening,
"it shall be unlawful to keep open any bridge within the
"city of Chicago for the purpose of permitting vessels or
"other crafts to pass through the same, for a longer

"period at any one time than ten minutes, at the expira-
"tion of which period it shall be the duty of the bridge-
"tender or other person in charge of the bridge to dis-
"play the proper signal, and immediately close the same,
"and keep it closed for fully ten minutes for such per-
"sons, teams or vehicles as may be in waiting to pass
"over, if so much time shall be required; when the said
"bridge shall again be opened (if necessary for vessels to
"pass) for a like period, and so on alternately (if neces-
"sary) during the hours last aforesaid; and in every in-
"stance where any such bridge shall be open for the pas-
"sage of any vessel, vessels or other craft, and closed be-
"fore the expiration of ten minutes from the time of
"opening, said bridge shall then, in every such case, re-
"main closed for fully ten minutes, if necessary, in order
"to allow all persons, teams and vehicles in waiting to
"pass over said bridge." (Printed Record, fol. 10.)

That the said city is enforcing each of said ordinances; that the appellant during the season of 1881 made about twenty-eight round trips with each of its said three propellers between Escanaba and the said docks of the Union, Iron and Steel Company, and delivered twenty-eight cargoes of ore to said company from each propeller; that in transporting said cargoes to said company, said propellers passed from Lake Michigan into the main branch of the Chicago river, thence along the same to the south branch, thence along that branch to said dock at or near where the south fork of said south branch crosses Archer avenue and Thirty-second street in said city, and in so doing they pass eighteen certain bridges; that neither of said propellers or any other vessel on the river, except towing vessels can pass said bridges when closed; that by the closing of said bridges, the free navigation of the river is totally obstructed during the whole time; that appellant has been, and is almost constantly greatly hindered and subjected to unreasonable delays of its pro-

pellers, whereby it has suffered great damage; that it has the right to carry on its business of transporting freight upon said river to the said docks without hindrance, etc., and that the city has violated that right; that said steam propellers could, without the aid of a towing tug, navigate said river from Lake Michigan to said docks were it not for the bridge piers, but that it is absolutely unsafe to pass Harrison street bridge, and all others further up said south branch with said propellers without the aid of a steam tug; that appellant has invariably employed a tug to tow each propeller on each trip at an expense of seventy dollars a trip, or $5,800 for the season of 1881; that the said closing of said bridges will greatly obstruct the free navigation of said river, and will greatly increase the difficulty and expense of navigating the same. (Printed Record, fol. 7.)

That said closing of said bridges would hinder and prevent the passage of citizens along said river and its branches with vessels as they had been accustomed to do, and would greatly obstruct navigation. And would also hinder the citizens of other states in the lawful use and enjoyment of said river, and would greatly increase the difficulty and expense of navigating the same, and would interupt, diminish and greatly disturbe trade and commerce thereon, to the great damage and common nuisance of the citizens and others of said states, and that the city of Chicago ought to be enjoined from so closing said bridges to the obstruction of such navigation. That said bridge piers, even when the bridges are open, are permanent and material obstructions to the free and unobstructed navigation of said river, which the citizens of said states are entitled to enjoy, to their great damage and common nuisance, and to their irreparable

injury. That said city continues said obstructions without any lawful authority so to do. (Printed Record, fol. 8.)

Prays that the court will decree that said bridges, when so closed for said hours or for any unreasonable length of time, constitute material obstructions, &c., and that each one is a nuisance, &c., and that said city ordinance be declared void, &c., and that said Harrison street and other bridges and the piers are to said citizens and to appellant, nuisances, and that all the said nuisances be abated, &c., and that the city be decreed to open said bridges upon the approach of vessels desiring to pass, and to keep the same open so as not to obstruct the free navigation of said river, and that the city, &c., be restrained from closing said bridges so as to obstruct the free navigation of the river, and prayer for general relief. (Printed Record, fol. 9.)

The appellee filed an answer to this bill February 3, 1882, whereby it admits that the main branch of the said Chicago river is navigable, but denies that it is a public highway; admits that it flows, as described in the bill, and that the city of Chicago has been built and established as described in the bill; admits the construction and maintenance along the main river, and the south branch thereof of numerous docks, wharves, yards, elevators, branch railroad tracks, &c., used as stated in said bill, and also admits that trade and commerce is carried on between the city of Chicago and the ports as alleged by appellant; also admits that the city has constructed and maintained bridges over the river, and that they are located and arranged as stated in the bill; and further admits that there is now in force the ordinances mentioned in the bill, and that each of them are duly enforced by the defendant, its

officers, agents and employes. That while the defendant is ignorant of the number of trips made by the propellers of the appellant, it admits that said propellers take the route alleged in the bill, and that they are obliged to pass eighteen of the bridges erected by the city, and five railroad bridges, and that said propellers are unable to pass said bridges when the same are closed. (Printed Record, fol. 13.)

The answer then alleges that the defendant is a municipal corporation existing under the statutes of the State of Illinois, and deriving its powers therefrom; that the Chicago river and its branches and forks lie wholly within and under the control of said state; that said state has full and complete power over said stream, such power not being restricted by any affirmative legislation on the part of the Congress of the United States; that the State of Illinois has delegated to the defendant the control and regulation of said river, and that all the acts complained of in the bill, both the erection and maintenance of said bridges with piers in the center of the stream, and the regulation by ordinace of the times for opening and closing the same were and are authorized by the State of Illinois by public statutes then and now in force; that while exercising the powers over said river conferred upon it by the State of Illinois, it alleges that it has in every case consulted as well the interests of commerce and of navigation as of the citizens of the city of Chicago. (Printed Record, fol. 14.)

That as to the ordinances, which it admits to have been duly passed and in force, the answer shows that there reside within said city a population of over 500,000, and in Cook county over 600,000; that the city is divided into the south, north and west divisions, and after giving the

boundaries of each division it says that the south division contains the vast majority of the offices, stores warehouses, public buildings and courts, and constitutes the main business portion of the city; that most of the citizens doing business in said south division reside in the other divisions and outside of the city, in Cook and adjacent counties; that such citizens in order to pass from one division of the city to another, and more particularly in going to and from their houses to their places of business are compelled to cross said river or its branches, that the amount of traffic across said bridges is enormous; that the city, to facilitate intercourse, has built two tunnels under the river, one at LaSalle street, connecting the north and south divisions, and one at Washington street, connecting the west and south divisions, but that said tunnels have proved wholly inadequate to relieve the travel to any material extent; that the travel is the greatest during week days between six and seven o'clock in the morning and between half past five and half past six in the evening, more particularly by reason of citizens going to their places of business in the morning and returning to their homes in the evening. (Printed Record, fol. 14.)

That to show more fully the amount and character of the traffic across said bridges the relative amount of navigation in the river, the number detained and length of time by opening bridges, the defendant annexes to its answer a tabulated statement of observations made at two of the bridges. (For which statement see Printed Record, fols. 64 to 66.)

Defendant, further answering, submits that in view of facts stated the said ordinances and each of them are reasonable and proper, and says that said ordinances im-

pose no great hardship upon complainant or upon the general navigation of the river, as the delays caused by the so-called ten minute ordinance are but trifling, and the navigators of said river can with no great difficulty arrange and have arranged to enter or leave the river at a time other than the two hours between 6 to 7 A. M. and between 5:30 to 6:30 P. M., and that the inconvenience or delay to navigation caused by the enforcement of said ordinance is but slight when compared with the injury and damage which would be caused to the citizens of the community were the same not enforced.

The answer then says that as to the bridges and the bridge piers which are alleged by complainant to be nuisances, the defendant shows that it was authorized by law to construct the same, and that they are lawful structures; and defendant denies that the same are nuisances or that they materially obstruct the navigation of the river, and denies that by said piers the river is divided into two channels, each considerably less than one half of the original channel, but says that the two channels on each side of the piers are together of greater width than was the original channel; that the south branch, between Harrison street to the docks of the Union Iron and Steel Company, has from time to time since the organization of the city, and by it, been deepened and widened, so that the distance from each abutment of each bridge to the bridge pier, is greater than was one half of the original channel of the river at said point, and that so far from obstructing the navigability of the river the city has done and continues to do everything possible to render the same more navigable.

That the bridge at Harrison street was erected by appellee, on the west side of the river, adjoining the west

shore, leaving a space seventy or eighty feet, as a channel; that afterwards, to increase the navigability of the river at that point, it condemned and excavated a portion of the west shore adjoining said bridge, and thus formed another channel on the west side of said bridge, some seventy-five feet wide, and instead of obstructing the channel at that point, has nearly doubled it in width. (Printed Record, fol. 15.)

The answer admits that the bridge piers are of greater length than the bridges, and says it is necessary that they should be, in order to protect the bridges from damage by vessels. Answer denies that it is necessary for appellant to employ a steam tug for its propellers on account of the bridges erected, but that if it were neccessary to do so on account of appellee's bridges, it would be necessary to do do so if defendants bridges were removed, and the railroad bridges remain.

The answer then alleges that the south branch and the south fork thereof were not naturally a navigable stream, and are not a public highway, and that above Harrison street the same could not have been navigated by the propellers of appellant; that said stream has been not only widened, but deepened by appellee, and that it is due to its efforts that said south branch and south fork can now be navigated by any of the said propellers, and submits that appellant ought not to be heard to complain, etc. (Printed Record, fol. 16.)

To this answer a general replication was filed.

The suit was heard in the court below, upon pleadings and proof, and the bill dismissed for want of equity. The complainant brings the case to this court upon appeal. (Printed Record, fol. 17.)

By its answer, the appellee, while conceding that the main branch of the Chicago river was navigable, denied that the south branch of the same was in its natural condition.

The facts in evidence are that it was navigated as far up as Bridgeport as early as between 1835 and 1846, when in its natural state, without difficulty, by vessels drawing from seven to eleven feet of water; that its width was from 100 to 150 feet, and vessels from 80 or 90 feet to 138 feet in length had no difficulty in turning around in it. (Printed Record, fol. 39.)

The main river and south branch, as far up as Bridgeport, were meandered by the United States surveyors in 1821, as navigable waters, and Bridgeport was designated as the "head of navigation," on the map of the government survey of township 39, range 14, made in 1821. (See map transmitted and marked "Complainant's Exhibit No. 2.")

The present bridges have all been constructed since 1845. At that time there were only two bridges across the river, and these were both floating bridges—one over the main branch and one over the south branch. (Printed Record, fol. 23; Original Record. 55.)

The evidence shows that the piers upon which the present bridges rest extend along the center of the channel for a distance varying from 150 to 250 feet, and are generally about thirty-three feet wide, being both longer and wider than the respective bridges. Many of the narrowest channels or draws on each side of these piers are from forty-six to sixty feet in width. At Polk street the two channels are fifty-two and one-half feet each, and the pier thirty-three feet. At Twenty-second

street, the channels are fifty-four or fifty-six feet each, and the pier thirty-five feet in width. At Halsted street, the channels are forty-six or forty-seven feet wide and the pier thirty-three feet. At Main street, the channels are each forty-seven, and the pier thirty-four feet wide. At Fuller street, the channel is fifty feet, there being but one. At Archer avenue, the two channels are fifty-eight feet each, and the pier thirty-four feet. At Douglas avenue, the channels are fifty-eight feet, and the pier twenty-three and three-fourths feet. At Twelfth street, the channels are each seventy or seventy-two feet wide, and the pier thirty-four. At Eighteenth street, the only channel is sixty-five feet wide, and the pier thirty-five feet. (Printed Record, fol. 61.)

At Harrison street, the pier on which the bridge rests was placed about two-thirds the way across the river, but since then the city widened it on the west side. (Printed Record, fol. 59.)

Before that time vessels could only pass on the east side, and loaded vessels cannot pass through the west channel now. Printed Record, fol. 24.)

The pier is thirty-four feet wide, with a channel sixty-six feet on each side. (Printed Record, fol. 61.)

The banks of the river opposite the piers on which the bridges rest are used more or less (except where the bridge abutments are) for docks, wharves and landings. At Harrison street the north end of this pier extends seventy-five feet past the north line of the street, opposite which seventy-five feet, the west bank of the river is occupied as a coal yard and the east bank as a stone-yard. The south end of the pier extends seventy-five feet south of the south line of said Harrison street, opposite which

on the east bank of the river is a stone-yard, and on the west side a lumber yard or coal yard. (Printed Record, fol. 62.)

When vessels are lying in these narrow channels or draws at the docks, yards, wharves and landings opposite these bridge piers other vessels cannot pass, neither can two ordinary sized vessels pass each other in these draws when going in opposite directions. (Printed Record, fol. 24.)

The same difficulty exists at other bridges on the south branch and at the Illinois Central Railroad bridge on the main branch, the entire banks of the river opposite the bridge piers at the latter, being private dock property. On the north side the bank is occupied by the Peshtigo Company for a lumber yard, which has a barge lying there nearly all the time, during which time no fair-sized vessel can pass through the north draw; so it throws all business of the river through the south draw, and two boats of any reasonable size cannot pass in the south draw, so when one boat is going down and another up, one must wait for the other to pass through. If the dock on the south side should come to be used as the Peshtigo Company are using theirs, then there would be no passing in or out of the river for a large proportion of the vessels which now navigate the same. (Printed Record, fols. 27, 28 and 33.)

The channels or draws between the piers on which Madison, Randolph, and some other bridges higher up the south branch rest, and the banks of the river, are too narrow to permit the larger class of boats upon the river to pass through. A great deal of freight would be carried by such boats if they could go up the south branch, which they now have to refuse.

The Goodrich Transportation Company, which runs a large number of steam vessels to and from Chicago, has five side-wheel steamers running daily between Milwaukee and Chicago, which are fifty-six feet wide; they cannot go up the south branch at all on account of the draw or channels at the bridges being so narrow, when, were it not for the location of the bridge piers, there would be no trouble in passing up. Said company could and would bring a good deal of freight from Milwaukee to Chicago to be delivered at points on the south branch above Madison street, if it could pass the bridges with said boats. They would take a great deal of such freight to the Pittsburgh and Fort Wayne Railroad depot, above Madison street, if they could get up there and save hauling from its docks below, but which it has to refuse, and the damage which that company has sustained by reason of being unable to run their boats up the south branch for the last fifteen years is estimated by its president at not less than $50,000. (Printed Record, fols. 29 and 33.)

So far as the docking and dredging of the river is concerned, the citizens have done all the docking under the direction of the city; and while the city has done more or less dredging since 1861, it has been mostly on the north branch, and in the center of the river. It also done dredging on the main branch, all the way from the south pier west up the river; but the evidence shows no dredging done on the south branch south of, and above Harrison street by the city. Below Harrison street and between it, and the main river some dredging was done, but how much is not shown, except that it was to twelve feet in depth. (Printed Record, fol. 60; original Record, 127.)

The keeping of all bridges across the river closed between 6 and 7 o'clock in the morning, and between 5:30 and 6:30 o'clock in the evening, as required by the ordinance, is shown to be a serious obstruction to navigation of the river, causing great delays to the vessels not only during the time the bridges remain closed, but by occasioning other delays as a consequence, which are quite as serious. (Printed Record, fols. 33 to 39.)

Most vessels arrive at Chicago in the morning; they cannot regulate the hour of their arrival. (Printed Record, fol. 21.)

The enforcement of this hour ordinance was commenced in July, 1881, and between that time and the close of navigation, in November of that year, the actual time the appellant's propellers were detained waiting for bridges to open, was about thirty hours, one propeller meeting with twelve detentions of an hour each while the bridges were closed, and one detention of six hours, at Madison street, caused by a big jam of vessels that had been occasioned by the closing for an hour. Another of these propellers, which made fifteen trips after the hour ordinance went into effect, was detained an hour at a time on nine of those trips; and on three or four trips the delay of an hour prevented unloading until the next day, and the loss of that much time to the propeller. (Pridted Record, fols. 21, 31, 32 and 41.)

Many persons running vessels upon the river suffered repeated and actual detentions, who have been called as witnesses.

Thomas Johnson not only sustained delays while the bridges were closed, but in consequence of such closing

was prevented from loading his vessel until the next day, and his trip was thrown two days behind another vessel that he otherwise would probably have been in company with. (Printed Record, fol. 33.)

Stephen Green was delayed a great many times, and testifies that it is a great deal more dangerous to take a vessel down the river after dark than by daylight, and that the closing of bridges between 5:30 and 6:30 P. M. after September 20th, made it necessary to tow vessels down after dark. (Printed Record, fol. 33.)

Peter Peterson was kept in the river with his vessel all night, in consequence of the closing of the bridge at 5:30 P. M., and afterwards lost an hour by the closing of the bridge. (Printed Record, fol. 34.)

John Sweeny was detained with his vessel on several occasions by the closing of the bridges after the hour ordinance went into effect, the aggregate time of detention being over thirty hours. (Printed Record, fol. 34.)

John O'Grady could not reach an elevator with his vessel on account of the bridges being closed, and was detained from Saturday until Monday. (Fol. 34.)

John Keelin was detained with his vessel from same cause, and shows how other detentions are occasioned by crowding of vessels together. (Fol. 35.)

Fay Nyman was detained twenty times, amounting altogether to 19¼ hours, in consequence of the enforcement of the hour ordinance, and shows how other delays result. (Fol. 35.)

James McIlwee shows how he lost business for his vessel in consequence of the closing of the bridges. Once lost ¾ cent a bushel on 48,000 bushels of grain. (Fol. 36.)

William Harmon testifies that the closing of the bridges an hour occasions other loss of time to vessels than simply the time the bridges are closed. That there are about forty tugs upon the river towing vessels. That the morning and evening are the busiest times, and a crowd of vessels accumulate; that several vessels have been detained for repairs in consequence of damages received in these jams, and have lost trips; and other vessels have made the same trips and returned, while the vessels so damaged were being repaired. That vessels that come in in the morning and should have been unloaded have been delayed so that they were unable to get out. That he knows of several cases where fewer trips have been made. That the commerce by lake and river to and from Chicago, has decreased since the hour closing of the bridges, to a certain extent. (Printed Record, fol. 37.)

J. A. Crawford estimates forty vessels and ten propellers detained at a time during the hour the bridges were closed, with from 300 to 500 men under pay, and a valuation of fleet and cargo detained from $2,000,000 to $3,000,000. (Fol. 38.)

James L. Higgie shows how other delays result and damages are caused. That the Vessel Owners' Towing Company, running 14 tugs, paid damages to the amount of $8,200. during 1881; that the closing of the bridges during the hour nearly trebled the damages sustained by said company during that year. That the earnings of tugs were reduced from 25 to 40 per cent. in consequence of the hour ordinance. (Fol. 39.)

Joseph C. Perritt shows that the closing of the bridges for an hour at a time delayed the boats of the Marquette

Barge Line Company, a line that brings lumber to Chicago, with nine barges, fifteen hours for each barge, and the calculated loss was fifteen dollars an hour when delayed. (Fol. 40.)

The appellant is a corporation organized under the laws of the State of Michigan, and was, in 1881, engaged in transporting iron ore from Escanaba, Michigan, to Chicago, and up the Chicago river and south branch to the docks of the Union Iron and Steel Company, on the south branch at Archer avenue and Thirty-third street, over four miles from the mouth of the river.

It had three steam propellers of its own, of upwards of 1,100 tons burden each, engaged in thus transporting ore. All duly enrolled and licensed for the coasting trade. (Printed Record, fols. 44 to 47.)

It employed other vessels to help in such transportation, it having a contract to transport from 100,000 to 175,000 tons of ore per year for five years, commencing in 1881. These propellers could not run up the south branch above Randolph or Van Buren street bridges without the aid of a steam tug, and had to be towed from there up to the docks where they took their ore, in consequence of the narrow channels or draws at the various bridges; the expense of such towing was thirty-three dollars each way, or sixty-six dollars for a round trip, thus making over $5,000 for the seventy-six round trips made by their three propellers in 1881. (Printed Record, fols. 20 and 21.)

The government of the United States has done dredging in the river in the vicinity of Rush street bridge, and from thence out into the lake at different times, and has frequently removed or cut through the sand bar at the mouth of the river, and has extended piers into the lake. (Printed Record, fols. 30, 31, 32, 36, 37 and 40.)

J. G. Lydecker, United States engineer, testified that the map accompanying his report for 1879, is official, showing conditions of improvements at that time that the channel was dredged to 16¼ feet in 1878; that the United States had done dredging in the Chicago river above the point where the channel connects with the river since 1877, but not west of light house shown on accompanying his annual report for 1879. That the immediate object of dredging the channel was to enable vessels to pass and repass entering the river. (Printed Record, folios 42 to 43.)

In connection with the testimony of Capt. Leydecker there was put in evidence by appellant a portion of the annual report of the chief of engineers for 1879, marked complainant's Exhibit No. 3; also the report of Major Gillespie, being appendix 7 of the annual report of the chief of engineers for 1876, marked Complainant's Exhibit No. 4, which exhibits are transmitted with the record as stated on folios 72 and 73 Printed Record.

A history of the improvements of the Chicago harbor by the United States and a report of the expenditure of the appropriations made for that purpose since 1875 will there be found.

There are two tunnels under the Chicago river, one at LaSalle street, between Wells and Clark streets, and the other at Washington street, between Madison and Randolph streets. (82.)

There is always plenty of room to pass through either of them as well for foot passengers as for teams. (Printed Record, folios 25, 34, 36, 35, 37, 38 and 39.)

They are in suitable condition to pass through. (Folio 38).

Appellant also put in evidence a published report of the trade and commerce of Chicago for the year 1881, which is marked Complainant's Exhibit No. 5, and is transmitted with record. (Printed Record, fol. 73.)

The lighthouse, erected by the United States, was on south side of the main branch of the river and a little west of where Rush street bridge now is. It stood there as late as 1849. (Printed Record, folio 43.) (Complainant's Exhibit, No. 1, transmitted with Record.)

Evidence was put in by appellee showing amount of travel across some of the bridges, accompanied by some detailed statements of the result of having observations taken at two bridges. (Printed Record, folios 63 to 66.)

Other reference to minor features of this case and to the evidence is reserved for the argument.

Assignment of Errors.

The appellant assigns and relies upon the following errors in the record of said Circuit court of the United States for the Northern District of Illinois:

First. The said Circuit court erred in decreeing that the bill herein be dismissed, and in rendering judgment against appellant for costs.

Second. The said Circuit court erred in not rendering a decree in accordance with the prayer of the bill of complaint herein.

Third. The said Circuit court erred in not decreeing that the said bridges were nuisances, and that the same be abated as prayed for in said bill.

Fourth. That said Circuit court erred in not granting an injunction as sought by said bill.

POINTS.

The first question which naturally presents itself is that of jurisdiction as between Federal and State authority, to wit:

Is there any limitation of the power of the state to authorize an obstruction to the Chicago river for municipal or other purposes?

The City of Chicago, the appellee in this case, insists that there is no such limitation whatever upon the power of the State of Illinois, for the reason, as it claims, that such power has never been restricted by any affirmative legislation on the part of the Congress of the United States.

First. Federal legislation regarding the navigation of this river has been as follows:

1. The ordinance of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio. (Vol. 1, U. S. Statutes at Large, p. 51; last clause of the 4th Article.)

2. An act of congress of August 7, 1789, entitled, "An act to provide for the government of the territory "northwest of the river Ohio."

Passed that the said ordinance of 1787 might continue

to have *full effect* after the adoption of the constitution of the United States.

U. S. Statutes at Large, Vol. I., p. 50.

See *Strader et al.* v. *Graham*, 10 How., bottom of p. 97, for construction of said act.

3. Act of congress May 7, 1800, dividing the territory northwest of the Ohio and establishing the Indiana territory, section 2 of which provides that the inhabitants of said territory shall be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people by the said ordinance of 1787.

U. S. Statutes at Large, Vol. 2, p. 59, Sec. 2.

4. An act of congress of March 26, 1804, making provisions for the disposal of the public lands in the Indiana territory, section 6 of which provides that all the navigable rivers, creeks and waters within the territory should be deemed to be and remain public highways, &c.

U. S. Statutes at Large, Vol. 2, p. 279, Sec. 6.

5. Act of congress of February 3, 1809, dividing the territory of Indiana into two separate governments and creating the territory of Illinois, section 2 of which provides for the enjoyment of the rights and privileges granted by said ordinance of 1787.

U. S. Statutes at Large, Vol. 2, p. 515, Sec. 2.

6. An act of congress of April 18, 1818, to enable the people of the Illinois Territory to form a constitution and state governmet, providing in section 4 that such constitution when formed should not be repugnant to the ordi-

nance of 1787, between the original states and the people and states and territory northwest of the river Ohio.

U. S. Statutes at Large, Vol. 3, p. 430, Sec. 4.

7. Resolutions of congress of December 3, 1818, entitled, "Resolutions declaring the admission of Illinois into the "Union," showing that the constitution is in confrmity to the provisions of the ordinance of 1787.

U. S. Statutes at Large Vol. 3, p. 536.

8. Revised Statutes of the United States of 1874. Title—"The Public Lands." Section 2476, which provides that all navigable rivers within the territory occupied by the public lands, shall remain and be deemed public highways, etc.

9. An act of congress of March 2, 1799, to regulate the collection of duties on imports and tonnage, wherein it is provided, among other things, that all the waters, shores and inlets connected with lakes Michigan and Superior, etc., should be included in the collection district of Michilimackinac.

U. S. Statutes at Large, Vol. 1, p. 638.

10. An act of congress of June 30, 1834, establishing ports of entry, etc.

U. S. Statutes at Large, Vol. 4, p. 716, Sec. 8.

11. An act of congress of July 16, 1846, establishing the collection district of Chicago, which provides that said district shall include the territory, harbors, rivers and waters on the western shore of Lake Michigan from the Indiana line to Sheboygan, etc.

U. S. Statutes at Large, Vol. 9, p. 38.

12. An act of congress of March 3, 1831, making appropriations for building lighthouses, etc., wherein $5,000 is appropriated for building a lighthouse at the mouth of the Chicago river, Lake Michigan.

U. S. Statutes at Large, Vol. 4, p. 491.

13. Various acts of congress making appropriations for the improvement of Chicago harbor from 1833 to 1881, found as follows:

Year.

1833,	$ 25,000,	Vol.	4,	p.	645,	U. S.	Statutes	at	Large.
1834,	32,000,	"	"	"	703,	"	"	"	"
1835,	32,800,	"	"	"	754,	"	"	"	"
1836,	32,000,	"	5,	"	67,	"	"	"	"
1837,	40,000,	"	11,	"	187,	"	"	"	"
1838,	30,000,	"	"	"	263,	"	"	"	"
1843,	25,000,	"	"	"	619,	"	"	"	"
1844,	30,000,	"	"	"	662,	"	"	"	"
1852,	10,000,	"	10,	"	58,	"	"	"	"
1866,	88,704,	"	14,	"	72,	"	"	"	"
1870,	150,000,	"	16,	"	226,	"	"	"	"
1872,	90,000,	"	17,	"	370,	"	"	"	"
1873,	20,000,	"	"	"	560,	"	"	"	"
1874,	75,000,	"	18,	"	227,	"	"	"	"
1875,	78,000,	"	"	"	456,	"	"	"	"
1876,	5,000,	"	19,	"	134,	"	"	"	"
1878,	75,000,	"	20,	"	156,	"	"	"	"
1879,	75,000,	"	"	"	368,	"	"	"	"
1881,	150,000,	"	21,	"	471,	"	"	"	"

14. Revised Statutes of the United States of 1874. Title—" Regulations of Vessels in Domestic Commerce," p. 838.

The provisions of the ordinance of July 13, 1787, that certain navigable waters should be common highways, and forever free, &c., have been continued in force by subsequent acts of congress, notwithstanding said ordinance may have been superseded or repealed by the constitution of the United States.

Strader et al. v. *Graham*, 10 How., 96–98.
Neaderhouser v. *The State*, 28 Ind., 257.
Depew v. *The Board of Trustees of the Wabash and Erie Canal*, 5 Ind., 8.
Cox v. *The State*, 3d Blackford Ind. Rep., 193. See page 200.
Hogg, W. & J., v. *Zanesville Canal and Manf. Co.*, 5 Ohio Report, 410. See page 416.
Spooner v. *McConnell et al.*, 1 McLean's Rep., see pp. 337, 373.
The Attorney General v. *The City of Eau Claire et al.*, 37 Wis., 400. See page 446.
Wisconsin River Improvement Company v. *Lyons*, 30 Wis., 61.
Columbus Ins. Co. v. *Curtinius*, 6 McLean, 209. See page 214.

The enabling acts authorizing the formation of constitutions for Ohio and Indiana are the same as that for Illinois.

Last clause of Sec. 5, Act April 30, 1802, Vol. 2, U. S. Stats. at Large, p. 174.
Enabling Act of Indiana, last clause, Sec. 4, Act Apr. 19, 1816, page 290, Vol. 3, U. S. Stats. at Large.

II.

How has the jurisdiction of the State of Illinois over this river been affected by said action of Congress in the premises?

1. That the commercial power of Congress has been so far exercised by the repeated appropriations and expenditures of money for the improvement of the Chicago harbor, as to be conclusive of any right to the contrary asserted under state authority, which shall in any manner impair the usefulness of such improvements. See the cases of *Wisconsin* v. *Duluth*, 96 U. S., 379–387. *United States* v. *Duluth*, 1 Dillon, 469.

2. Aside from the appropriations and improvements which congress has made, there are such other assertions of congressional jurisdiction over this river as to exclude all such state interference as shall impair the free navigation of the same.

Direct legislation prohibiting obstructions is not indispensable. It is not necessary that congress shall declare in terms that the state shall not, by the construction of bridges or otherwise, obstruct the navigation of the Chicago river.

If congress has *by any expression of its will* occupied the field, such action is conclusive of any right to the contrary asserted under state authority.

In addition to the positive legislative enactments that it shall be deemed to be and remain a public highway, other assertions of congressional jurisdiction have repeatedly

been had by licensing vessels, by establishing ports of entry, imposing duties upon masters and other officers of boats, and by appropriating money to build a lighthouse. These acts constitute a complete and sufficient assertion of congressional jurisdiction to divest the state of authority which otherwise it might have exercised.

State of Pennsylvania v. *Wheeling Bridge Co.*, 13 How., 518, 561, 565, 566.

III.

The right of the State of Illinois to authorize the construction of bridges over the Chicago river is not denied. This comes within the unquestionable jurisdiction of the state, to be exercised, however, in subordination to the asserted commercial power of congress.

The question arises as to what is a legitimate limitation of the power of the state to authorize obstructions for municipal or other purposes, to the free navigation of the Chicago river.

An answer to this question may be found in the rule as stated by this court, in the Wheeling Bridge case, which is, that "if the obstruction be slight, as the draw in a "bridge, which would be safe and convenient for the pas- "sage of vessels, it would not be regarded as a nuisance, "where proper attention is given to raise the draw on the "approach of vessels."

State of Pennsylvania v. *Wheeling, &c., Bridge Co.*, 13 How., 577.

Columbus Insurance Co. v. *Peoria Bridge Co.*, 6 McLain, 70.

Illinois R. Packet Co. v. *Peoria Bridge Asso.*, 38 Ill., 467.
Steamboat Globe v. *Kurtz*, 4 Iowa, 433.
The Attorney General v. *EauClaire*, 37 Wis., 447.
Williams v. *Beardsley*, 2 Carter, Ind., 591.
Scott v. *The City of Chicago*, 1 Biss., 510.
The Milwaukee Gas Light Co. v. *The Schooner Gamecock*, 23 Wis., 144.

The evidence demonstrates that these bridges over the Chicago river, constructed as some are,—and regulated as all are,—do materially obstruct navigation, and have totally prohibited an extensive commerce above a certain point, and tend greatly to deteriorate all commerce upon the river, and to depreciate the value of property engaged in that business.

ARGUMENT FOR APPELLANT.

MAY IT PLEASE THE COURT:

The bill alleges that all the bridges across the Chicago river, when closed continuously an hour at a time, twice each day, in accordance with a certain city ordinance, are unlawful obstructions to navigation; that the ordinance requiring them to be so closed is illegal and void, and that certain of the said bridges, together with the piers whereon they rest, constitute permanent and unlawful obstructions to navigation, on account of the position they occupy in the channel of the river.

The City of Chicago, the appellee, by way of defense, says that the Chicago river and all its branches and forks lie wholly within the State of Illinois, and that said state has full and complete power over the same, such power not being restricted by any affirmative legislation on the part of Congress; that the State of Illinois has delegated the control and regulation of said river to it, the said city, and that it was authorized by said State to do all the acts complained of against it by the bill.

But it however, pretends that in the exercise of this unlimited power which it claims to possess over said river, it has very graciously consulted as well the interests of commerce and navigation, as that of its citizens.

The claim that the State of Illinois possesses such power is grounded upon the assertions that the Chicago

river lies wholly within the state, and that there has been no affirmative legislation by Congress restricting its power.

The assertion that the Chicago river lies wholly within the State of Illinois, is true; nevertheless, that it is a channel of inter-state commerce cannot be denied. That is determined from the fact that upon said river is carried on commercial intercourse between the citizens of one state and the citizens of other states.

The other assertion brings us to an investigation of the question:

HOW FAR HAS THE POWER OF CONGRESS BEEN EXERCISED?

Congressional legislation and action, which bears upon the navigation of this river, has been varied, but is principally of two classes.

First. By the appropriation and expenditure of money from time to time to improve the navigation of the said river.

Second. By acts declaratory of the free navigation of said river.

The appropriations were commenced as early as 1833, and have been continued almost yearly for much of the time since. Beginning with 1833, there were six annual appropriations, averaging over thirty thousand dollars each. In each of the years 1843, 1844, 1852 and 1866, large appropriations were made, and from 1870 to 1881, there were nine annual appropriations for the same purpose, averaging over eighty thousand dollars each.

While evidence was not introduced showing the actual

expenditure of all these appropriations, yet it shows how a large amount was expended.

In 1831, Congress also appropriated five thousand dollars for building a light house at the mouth of the Chicago river, and the evidence shows that the light house was constructed, and that its location was above and west of two of the bridges across the main river, to wit: Rush street bridge and the Illinois Central Railroad bridge.

By this action of the Congress of the United States, there has clearly been such an exercise of its commercial power as not only to render it paramount but exclusive.

A case very much in point is that of *United States* v. *City of Duluth et al.*, 1 Dillon U. S. Cir. Ct. Rep., 469.

There the government of the United States, by means of appropriations made by congress, was making certain improvements at the mouth of the St. Louis river intended to keep open and to deepen the channel at that point, and to narrow the same by means of piers on each side, so that the body of water carried through it might be increased in velocity and keep the channel free from the deposit which had a tendency to fill it up and obstruct the passage of vessels.

The defendants were engaged in cutting a canal across the upper end of Minnesota point, near Duluth, through which a current of the St. Louis river would flow, and be diverted from the channel which the government was improving, that being its natural course. The result would be to render ineffectual the efforts of the United States to protect and deepen the natural channel at the mouth of said river, and to cause it to be filled up, so as to become incapable of navigation. This canal was au-

thorized by the State of Minnesota, and was important to her commerce.

To prevent this result, the court was asked to enjoin the defendant from further work on said canal.

The court, Mr. Justice MILLER, in delivering the opinion, after disposing of a jurisdictional question, says, on pages 471-2: (1 Dillon.)

"That the protection, improvement, and general con-
"trol of the navigable waters of the United States are
"within the constitutional competency of Congress, there
"can be no doubt. This power has been so often
"asserted, both in Congress and in the Supreme court,
"that reference to adjudged cases would be an affectation
"of learning. No one has denied this for many years
"past, and it is not denied by counsel on the present occa-
"sion. It is, however, asserted that the states have a
"concurrent right to authorize improvements on the navi-
"gable waters of the United States in which their citi-
"zens are interested, so far as these water lie within their
"territorial limits; and it is shown by affidavits, and by
"the statutes of Minnesota that the canal here complained
"of is authorized by said state, and is important to her
"commerce, and is within her territory. That such a
"power can be exercised by the states may be admitted,
"when it does not injure the general interest of com-
"merce, and when it does not conflict with any control
"assumed by the federal government over the same
"locality.

"But all the reported cases which concede this power
"in the states agree that it exists only while the Congress
"of the United States refrains from the assertion of its
"authority, and that when the latter is called into exer-
"cise, it is not only paramount, but exclusive.

"Such is the principle asserted by the Supreme court in
"*Crandall* v. *Nevada*, 6 Wall., 35, and in *Gilman* v. *Phila-*
"*delphia*, 3 Wall., 713, and in *Cooley* v. *The Board of*
"*Wardens*, 12 How., 299, in all of which the question is
"thoroughly examined.

"Nor can any doubts be entertained, from the facts be-

"fore us, that the Congress of the United States has "called into exercise the federal power in the improve- "ment of the navigation between Lake Superior and Su- "perior Bay. They have made appropriations for this "purpose more than once, one of which is so recent as "the month of March last, which is yet unexpended, "and the mode of expending this money, being confided "by Congress to certain officers of the government, it "must be held that whatever is done by them in further- "ance of that purpose is done under the authority of "Congress."

In the Wheeling Bridge case, 13 How., 561, it was held that the making of appropriations by Congress to improve the navigation of the Ohio river was a regulation of commerce under the constitution.

And in the case of *Wisconsin* v. *Duluth*, 96 U. S., 379, this court, referring to certain acts of Congress making appropriations for the improvement of the harbor at Duluth, Minnesota, says, p. 386:

"We do not feel called upon to make an argument to "prove that these statutes of the Congress of the United "States, and these acts of the Executive Department in "carrying those statutes into effect, constitute an adop- "tion of the canal and harbor improvement started by the "city of Duluth, and a taking exclusive charge and con- "trol of it. That they amount to the declaration of the "Federal government, that we here interpose and assert "our power. We take upon ourselves the burden of this "improvement, which properly belongs to us, and that "hereafter this work for the public good is in our hands "and subject to our control.

"If the merest recital of these acts of Congress, and of "the War Department under them, do not establish that "proposition, we can have little hope of making it plain "by elaborate argument.

"Nor can there be any doubt that such action is "within the constitutional power of Congress. It is a "power which has been exercised ever since the govern-

"ment was organized under the Constitution. The only "question ever raised has been, how far and under what "circumstances the exercise of the power is exclusive of "its exercise by the States. And while this court has "maintained, in many cases, the right of the states to "authorize structures in and over the navigable waters "of the States, which may either impede or improve their "navigation, in the absence of any action of the gen- "eral government in the same matter, the doctrine has "been laid down with unvarying uniformity, that when "Congress has, by any expression of its will, occupied "the field, that action was conclusive of any right to the "contrary asserted under State authority. The adjudged "cases in this court on this point are numerous.

"This subject was recently very fully considered in "*South Carolina* v. *Georgia et al.*, 93 U. S., 4, and at this "term in *Pound* v. *Turk*, 95 *id.*, 459. The doctrine was "settled, however, long before this. The following cases "are fully in point: *Gibbons* v. *Ogden*, 9 Wheat., 1; "*Wilson et al.* v. *The Blackbirk Creek Marsh Co.*, 2 Pet. "245; *The Wheeling Bridge Case*, 18 How., 421; *Gilman* "v. *Philadelphia*, 3 Wall., 713."

Second. Another important class of congressional legislation applying to and affecting the navigation of the Chicago river consists of various acts declaring that certain rivers, which include the Chicago, should be deemed to be and remain public highways.

These consist of the acts relating to the sale of public lands, and to the acts passed from time to time providing for the government of the territory, of which the present State of Illinois was a part, and also for the admission of saids tate into the union.

By the act of March 26, 1804, making provision for the disposal of the public lands in the Indiana territory, of which Illinois then formed a part, it was provided "that all the navigable rivers, creeks and waters within

"the territory should be deemed to be and remain pub-
"lic highways, etc."

U. S. Stat. at Large, Vol. 2., p. 279, Sec. 6.

This and other act of Congress relating to the sale of public lands elsewhere are still in force as section 2,476, Rev. Stat. of the United States of 1874, which provides "that all rivers within the territories occupied by the pub-
"lic lands shall remain and be deemed public highways." For other statutes see

Vol. 1 U. S. Statutes at Large, p. 468, Sect. 9.

Vol. 2, U. S. Statutes at Large, p. 235, Sect. 17.

For a construction of these statutes see the case of *Railroad Company* v. *Schurmin*, 7 Wall., 272.

It was there held that the proprietors of lands bordering on navigable rivers under titles derived from the United States, held only to the stream, as the express provision was "that all such rivers should be deemed to be and re-
"main public highways." (page 287.)

In legislating for the government of the territories, Congress, on May 7, 1800, passed an act establishing the Territory of Indiana, and on February 3, 1809, an act dividing said territory and creating the Territory of Illinois.

U. S. Stat. at Large, Vol. 2., page 279, Sec. 6.

U. S. Stat. at Large, Vol. 2., page 515, Sec. 2.

Each of these acts expressly secured to the inhabitants the rights and privileges granted and secured by the ordinance of July 13, 1787.

Article 4 of this ordinance provided, among other things, that "the navigable waters leading into the Mis-"sissippi and St. Lawrence, and the carrying places be-"tween the same, shall be common highways, and forever "free, as well to the inhabitants of the said territory, as "to the citizens of the United States, and those of other "States, &c."

If said article 4 of said ordinance ceased to be in force upon the adoption of the constitution of the United States, it was revived and continued in force by the act of congress of August 7, 1789, entitled "An Act to provide for "the Government of the Territory Northwest of the river "Ohio."

U. S. Stat. at Large, Vol. 1, p. 50.

See *Strader el. al.* v. *Graham*, 10 How., 82, in which the court, speaking of the articles of said ordinance, says (page 96): "It is undoubtedly true, that most of the ma-"terial provisions and principles of these six articles, not "inconsistent with the Constitution of the United States, "have been the established law within this territory since "the Ordinance was passed; and hence the ordinance itself "is sometimes spoken of as still in force. But these pro-"visions owed their legal validity and force, after the Con-"stitution was adopted, and while the territorial govern-"ment continued, to the act of Congress of August 7, "1789, which adopted and continued the Ordinance of "1787, and carried its provisions into execution, with "some modifications which were necessary to adapt its "form of government to the new Constitution."

Congressional legislation continuing the provisions of said ordinance of 1787, within the territory now comprising

the state of Illinois, was not confined to the territorial government.

By the act of April 18, 1818, entitled, "An act to enable the people of the Illinois Territory to form a constitution and state government, and for the admission of "such state, etc," it is provided that such constitution, whenever formed, should be republican, *and not repugnant to said ordinance.*

U. S. Stat. at Large, Vol. 3, p. 430, Sec. 4.

Under this enabling act, the people of the territory adopted a state constitution August 26, 1818.

On the 3d of December following Congress passed a resolution declaring the admission of the state into the Union, in which it was recited that said constitution and state government so formed, was "republican, and in conformity to the principles of the said articles of compact "between the original states and the people and the states "in the territory north-west of the river Ohio, passed the "13th of July, 1787."

U. S. Stat. at Large, Vol. 3, p. 536.

It is difficult to see how Congress could have been more vigilant than it has, in securing and perpetuating the rights and privileges of free navigation, as provided in said ordinance of 1787. It has made it a condition upon which the people acquired title to the public lands, that *the navigable rivers, creeks and waters should be and remain public highways.*

It made it a condition upon which the territory was to be admitted as a state *that the navigable waters leading into the Mississippi and St. Lawrence, etc., should be com-*

mon highways, and forever free, etc., such being the provisions of said article 4 of said ordinance.

The acts of congress with reference to Illinois and Indiana in the particulars referred to have been almost indentical throughout. Their force and effect have been more frequently passed upon by the courts of Indiana than Illinois.

In the case of *Depew* v. *The Board of Trustees of the Wabash and Erie Canal*, 5 Indiana, 8, it is held that the provision in the ordinance of 1787, that the navigable waters leading into the Mississippi, etc., shall be free, etc., was superseded by the adoption of the constitution of the United States. But that congress had by subsequent acts, so far recognized and adopted that provision as to give it the force of an exisiting law. And that a state had no right, now, seriously to obstruct the navigation of streams which are channels of inter-state trade.

And in the case of *Neaderhouser* v. *The State*, 28 Ind., 257, it was held that the Ordinance of 1787 had been so recognized and adopted by subsequent acts of Congress, so far as it relates to navigable streams, as to give it the force of a subsisting law of the United States; that Congress having exercised the power to regulate commerce by declaring that the navigable waters leading into the Mississippi, etc., should be common highways, etc., the navigation of such streams could not be materially obstructed by state authority.

But that this power of Congress is confined to those streams which are channels of commerce between the states; such as are navigable, in fact, for vessels of commerce coming out of, and returning into, by continuous

voyages, the navigable waters of other states. (28 Ind., 266.)

The Supreme court of Illinois has left it an open question as to whether said ordinance is in force in that state, but construe and apply it to the case under consideration.

Ill. R. Packet Co. v. *Peoria Bridge Ass'n*, 38 Ills., 467. (See pages 477–8.)

The courts of Ohio and Wisconsin, two other states that were formed out of said northwestern territory, have adopted the same rule as the Supreme court of Indiana.

See *Hogg* v. *Zanesville Canal, &c., Co.*, 5 Ohio Report, 410–416.

Hickok v. *Hine*, 23 Ohio State Rep., 523.

Palmer v. *Commissioners of Cuyahoga County*, 3d McLean's Rep., 226.

Spooner v. *McConnell*, 1 McLean's Rep., 337, 373.

The Attorney General v. *The City of Eau Clare et al.*, 37 Wis., 400, 446.

The Milwaukee Gas Light Co. v. *The Schooner Gamecock*, 23 Wis., 144.

Wisconsin Improvement Co. v. *Lyons*, 30 Wis., 61.

In this last case it is said that the first section of an act, which pursued the language of said ordinance with regard to navigable waters, was a positive statutory prohibition to the erection of a dam, even though when erected it should prove no detriment to navigation.

And in the case of *Columbus Ins. Co.* v. *Curtinius*, 6 McLean, 209, the court, page 214, says that it is apparent from the whole tenor of the legislation of Congress, that

it has re-enacted that part of the ordinance of 1787, relating to navigable waters.

This doctrine that Congress has entirely failed to regulate commerce upon the Chicago river, and that, therefore, the whole field of jurisdiction is open to state dominion would seem to be completely demolished by the Wheeling bridge case. The obstruction was not more total and serious in that case than in the one at bar, while the direct and affirmative congressional legislation was substantially alike in each case.

On p. 561 of 13 How., this court in that case say:

"That the Ohio River is navigable, is a historical fact, "which all courts may recognize. For many years the "commerce upon it has been regulated by Congress, "under the commercial power, by establishing ports, re- "quiring vessels which navigate it to take out licenses, "and to observe certain rules for the safety of their pas- "sengers and cargoes. Appropriations by Congress have "been frequently made, to remove obstructions to naviga- "tion from its channel."

At page 565 it further says that

"It is objected that there is no act of Congress pro- "hibiting obstructions on the Ohio River, and that until "there shall be such a regulation, a State, in the con- "struction of bridges, has a right to exercise its own "discretion on the subject. Congress have not de- "clared in terms that a State, by the construction of "bridges, or otherwise, shall not obstruct the navigation "of the Ohio, but they have regulated navigation upon it, "as before remarked, by licensing vessels, establishing "ports of entry, imposing duties upon masters and other "officers of boats, and inflicting several penalties for "neglect of those duties, by which damage for life or "property has resulted. And they have expressly sanc- "tioned the compact made by Virginia with Kentucky at "the time of its admission into the Union, 'that the use "and navigation of the River Ohio, so far as the territory

"of the proposed state or the territory that shall remain "within the limits of this Commonwealth lies thereon, shall "be free and common to the citizens of the United States.' "Now, an obstructed navigation cannot be said to be free.
* * * * *

"This compact, by the sanction of Congress, has be- "come a law of the Union. What further legislation "can be desired for judicial action?

* * *

"The case of *Wilson* v. *Blackbird Creek Marsh Co.*, "(2 Peters, 250,) is different in principle from the case "before us. A dam was built over a creek to drain a "marsh, required by the unhealthiness it produced. "It was a small creek, made navigable by the floating "of the tide. The Chief Justice said it was a matter "of doubt whether the small creeks, which the tide "makes navigable a short distance, are within the gen- "eral commercial regulation, and that in such cases of "doubt it would be better for the court to follow the "lead of Congress. Congress have led in regulating com- "merce on the Ohio, which brings the case within the "rule laid down. The facts of the two cases, therefore, "instead of being alike, are altogether different. No "State law can hinder or obstruct the free use of a license "granted under an act of Congress."

The rule announced in this Wheeling Bridge case has never been departed from by this court.

In the case of *Mississippi and Missouri Railroad Company* v. *Ward*, 2 Black, U. S., 485, it is said, on page 494–5, that the rule is that if the abridgment of the right of passage occasioned by the erection was for a public purpose, and produced a public benefit, and if the erection was in a *reasonable situation, and a reasonable space was left for the passage of vessels on the river*, then it was not an unreasonable obstruction; and cites the Wheeling Bridge case, 13 How., 623, as authority in support of that rule.

And, in the case of *Wisconsin* v. *Duluth*, 96 U. S., 379,

supra, said Wheeling Bridge case, in 18 How., 421, was, among others, referred to as being fully in point in support of the rule *that when congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority.*

Inasmuch as congress has expressed its will with regard to the Chicago river, in the same manner and quite as emphatically as it had with reference to the river at Duluth, and also the one at Wheeling, it is difficult to see why the rule thus announced should not be adhered to in the case at bar.

Is the navigation of this river unreasonably obstructed?

First, as to the closing of all the bridges under the ordinance.

The bridges in question, when closed for the space of two hours each day, are as serious obstructions to navigation during that time, as though they were permanent and immovable barriers across the river.

The fact that all navigators upon the river know that such closing will occur, renders the obstruction thereby caused none the less serious. The proof that the running of vessels *cannot* be adapted to such closing, stands uncontradicted; and not only that, but the evidence further conclusively shows that such closing during the two hours named, causes more delay to vessels than it would for any other two hours in the day.

In justification of such closing the city asks that its acts may be sanctioned on the ground of public convenience. It asks that the advantages and disadvantages may be

contrasted, and a balance struck, as it were, of profit and loss as between river navigation and inter-state commerce on the one hand, and the personal convenience of the citizens on the other.

By its answer it sets forth that the city is divided by the river and its branches into the south division, the north division and the west division; that the south division contains the vast majority of the offices, stores, warehouses, public buildings and courts, and constitutes the main business portion of the city; that most of the citizens doing business there, reside in the other divisions and adjacent territory; that such citizens, in order to pass from one division of the city to another, and more particularly in going to and from their houses to their places of business, are compelled to cross said river or its branches, and the travel across said bridges is enormous; that the amount of such travel and traffic is greatest, during the week days, between the hours of 6 and 7 o'clock in the morning, and between 5:30 and 6:30 in the evening, more particularly by reason of citizens going to their places of business in the morning and returning to their homes in the evening. It then submits that in view of these facts, the said ordinances and each of them are reasonable and proper, and their enforcement required. While it ostensibly does this more for the purpose of illustrating its magnanimity toward commerce upon the river, rather than from any admitted necessity of interposing any defense of that kind, yet the idea advanced seems to be that the rights of citizens to navigate the river and carry on an inter-state commerce, and the rights of the people living on its banks to cross the same are correlative and reciprocal, and that the question here arising is whether the bridge ordinances are an equitable adjustment of these rights.

This question could only be material except upon the theory that the State has not that full and complete power over this river which the appellee has claimed for it in its answer.

Assuming, then, that the power of Congress to regulate commerce has been so far exercised in this case as to be conclusive of any right to the contrary asserted under state authority, it becomes material to determine to what extent the State may still authorize the construction of bridges, and to what extent such bridges may lawfully operate as obstructions to the free navigation of the river as secured by such congressional legislation?

That the power to erect bridges across navigable waters within proper limits vests within a State of course cannot be denied, and it is insisted only that it shall not be so exercised as to appreciably obstruct commerce or impair the free navigation of the river. An obstructed navigation cannot be said to be a free navigation. The question of interference is one of evidence; and no judicial opinion can be found upholding an acknowledged material interference with free navigation thus secured by action of Congress.

Courts seem to have considered the question of public necessity for the existence of bridges across navigable rivers, not so much for the purpose of determining the degree of obstruction to be tolerated thereby, as for the purpose of determining *the right to erect them at all.*

In the Wheeling Bridge case the attempt to have such a rule adopted as appellee seems to contend for, was ineffectual. Evidence was offered "to show the amount of "inconvenience or injury which the public would suffer "by the want" of the bridge. The proof was rejected

by the commissioner, and exceptions taken. (13 How., 556; Exception 8.)

Justice McLEAN, delivering the opinion of the court, says (page 577):

"It is said that the interest of commerce requires navi-
"gable waters to be used, and that in such a case the in-
"quiry should be, whether the benefit conferred upon com-
"merce by the cross route is not greater than the injury
"done. In the case of *The King* v. *Sir John Morris*, 1st
"Barn. and Adolph, 441, it was held that the injury cannot
"be balanced against the benefits secured. And in the
"case of *The King* v. *George Henry Ward*, 4 Ad. & El.,
"384, it was held, where the jury found that an embank-
"ment complained of was a nuisance, but that the incon-
"venience was counterbalanced by the public benefit
"arising from the alteration, it amounted to a verdict of
"guilty.

"If the obstruction be slight, as a draw in a bridge,
"which would be safe and convenient for the passage of
"vessels, it would not be regarded as a nuisance where
"proper attention is given to raise the draw on the
"approach of vessels. Of this character is the complaint
"of the plaintiff against the bridge—that it obstructs sea
"vessels built at Pittsburg. Sails cannot be used to
"advantage on the Ohio or the Mississippi, consequently
"there can be no necessity of raising the masts until it
"becomes necessary to hoist the sails. Such vessels float
"down the river or are towed by steam vessels.

"It is true, the injury done to the State of Pennsylvania
"may seem to be small, when compared to the magnitude
"of this subject.

"It applies to all our rivers, and affects annually a trans-

"portation of many millions of passengers, and a commerce "worth not less than six hundred millions of dollars. It "would be as unwise as it is unlawful, to fetter, in any "respect, this vast commerce."

And in the case of *Williams* v. *Beardsley*, 2d Carter Ind., 591, speaking of the power of the State of Indiana to authorize the construction of a bridge across the St. Joseph river, the court, on page 596, says:

"In the present case we have supposed that this power "is limited to the authorizing of such improvements as "a public highway; and, it is true, the question of nuisance "does not depend upon the amount of public benefit "conferred by the bridge; but, if the bridge was neces- "sary for the convenience of the public, and did not "prevent the free use of the stream as a public highway, "even although it may have occasioned some slight "inconvenience to those who had been in the habit of "navigating the stream by obliging them to take some "additional precautions in passing it, we think it would "not, therefore, be necessarily a nuisance."

See also, the case of *Attorney General* v. *Eau Clair*, 37 Wis., 447. And the case of *Hatch* v. *Watlamet Iron Bridge Co.*, 7 Sawyer, U. S. Cir. Ct., 127.

WHAT IS A LAWFUL OBSTRUCTION?

As to the degree of obstruction that may lawfully be permitted in the interest of public convenience or necessity, this court has held in the Wheeling Bridge case, *supra*, 13 How., 577, that "if the obstruction be slight, as the "draw in a bridge, which would be safe and convenient "for the passage of vessels, it would not be regarded as

"a nuisance, when proper attention is given to raise the "draw on the approach of vessels."

In the case of *Columbus Insurance Co.* v. *Peoria Bridge Co.*, 6th McLain, 70, his Honor, Judge DRUMMOND, held that the authority to construct a bridge across a navigable stream should be so exercised as to interfere as little as possible with the free navigation of the river.

The Supreme court of Illinois, in the case of *Illinois R. Packet Co.* v. *Peoria Bridge Asso.*, 38 Ill., 467, after expressly approving this rule adopted by Judge DRUMMOND in the case above cited, hold that the true doctrine is, that conceding the right of the states to authorize building bridges over the navigable waters lying within its jurisdiction, such structures should be so erected as to interfere as little as possible with the right of free navigation.

In the case of *Steamboat Globe* v. *Kurtz*, 4 Iowa, 433, it held that the DesMoines river is a navigable stream and a public highway, and that consequently, a steamboat may lawfully navigate the same; and although a ferry may be legally established upon that river, it must be so conducted as to avoid obstructing its navigation.

That the right to navigate the river is paramount to a ferry franchise, and therefore a steamboat is not required to wait for a ferryman to lower his cable so as to run any risk or suffer any damage from the delay.

That a ferry cable extending across a navigable stream should be so managed as not to be an obstruction to navigation, and so as to cause neither inconvenience nor damage to boats.

The same principle is recognized in the case of *County of*

Mobile v. *Kimball*, 102 U. S., 691; this court in speaking of the cases where state authority is not superseded, holds that the improvement of harbors, bays and navigable rivers, falls within that category of cases; that the control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power; that such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement; that to promote the growth of their internal commerce, the states have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels and improve them generally, *if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided for by the general government.*

In *Jolly* v. *Terre Haute Draw Bridge Co.*, 6 McLean, 237, it is held that the language "convenient draw bridge" imports a draw which can be passed without vexatious delay or risk, and if it is not such a one, the charter is violated, but if it meets the act of incorporation, and is yet a *material* obstruction to navigation, *the act is a nullity, for want of power in the legislature to pass it.* (See head notes, p. 238.)

In the case of *The Attorney General* v. *Eau Claire*, 37 Wis., 447, the court uses the following language with reference to the degree of obstructions to navigation that is lawful:

"The actual navigation may be little, and the obstruc-
"tion might be slight. So the affidavits tend to show.
"But neither the right nor the wrong is a question of de-
"gree. We cannot listen to one about to put an unlaw-
"ful work in a public river, that it will not materially

" obstruct navigation. If the obstruction be undertaken " without valid authority, it is our duty, in a proper case, " without counting convenience or inconvenience, to in- " terpose the prerogative writ of the state, to secure the " prerogative right of the state from infringement."

And in the case of *Williams* v. *Beardsley*, 2d Carter, Ind., 591, *ante*, the rule is stated to the same effect. The case of *Scott* v. *The City of Chicago*, 1 Biss., 510, involved this same question of opening bridges, with reference to Madison street bridge across the Chicago river, and his Honor, Judge Drummond, held that the city of Chicago was bound to use proper care and precaution to allow vessels to pass the bridges across the Chicago river. That if a vessel gives notice to the proper persons that she intends to move up or down the river, it is the duty of the city to prepare for her passage and remove any obstacle which may offer.

The power of the state to authorize an obstruction to inter-state commerce, being based upon and attempted to be justified by public necessity, such necessity must be shown to exist, and the burden of showing it should, it would seem, rest upon the party alleging it.

There is no evidence in the case showing any considerable amount of travel over any of the large number of bridges in the city, except four, viz: Clark, Wells, Randolph and Madison streets. The appellee caused observations to be taken as to the amount of travel, for the purpose of showing that there was a much greater necessity for closing the bridges between the hours named than at any other time, but a glance at the tables, giving the results of observations at the only two bridges where hourly observations were taken, shows that there was no more necessity for the existence of this ab-

solute obstruction to navigation between the hours of 6 and 7 A. M. than there was between the hours of 7 and 8 A. M. Looking at Printed Record, fol. 65, it will be seen that the number of pedestrians crossing eastward over Randolph street bridge between 6 and 7 A. M. was but 580, while between 7 and 8 A. M. it was 630, and the number of street cars passing in the same direction at the same time was increased from forty-two to fifty-one, while the number of vehicles crossing in the same direction during the same hours was increased about five-fold, there being twenty-five only between 6 and 7 A. M., and 120 between 7 and 8 A. M. If we carry the comparison to the hour between 8 and 9 A. M., we will find the vehicles had increased to 176, the loaded street cars to sixty, while the pedestrians had only decreased to 200 less than during the closed hour; and, as the number of loaded street cars had increased eighteen, with twenty passengers each, as the evidence shows, we have an increase of 360 people in cars to off-set as against the decrease of 200 on foot, and that without taking into account those who rode in the 151 extra vehicles which passed between 8 and 9.

The comparison can be carried an hour further with about the same result, to wit: between 9 and 10, those on foot were the same; the street cars had increased eleven, being more than sufficient to make up the difference, and vehicles had still further increased. Nor was there much falling off the next hour. As to the vehicles that crossed this bridge during the day it will be seen that the number between 6 and 7 was only twenty-five, while the average per hour during the day was ninety-one. From the table showing amount of travel going west over said bridge that day it will be found that the average number of vehicles per hour was 138, while the number between 5:30

and 6:30 was 385. This probably can be accounted for on account of Lake street bridge being closed to teams, that as the evidence shows. And it will be seen that of the 1,865 vehicles going west over Randolph street bridge, only 1,234 had come over it from the west, the balance probably having mostly come over Lake street, but returned over Randolph street, which was the nearest bridge. (Printed Record, fol. 66.)

At Wells street the number crossing on foot while the bridge was closed, between 6 and 7 A. M., April 18, 1882, was only 555 more than during the following hour, while the number of loaded street cars had increased twenty-five which at twenty passengers each, the number estimated, would make up the deficiency in foot passengers nearly, and as the vehicles had increased twenty in number it is fair to presume that the number of people was about equal, while the vehicles, including street cars, had increased forty-five during the hour, showing an equal public necessity for continuing the blockade an hour longer. And during the hour between 8 and 9 the number of pedestrians had only fallen off one-half, while the vehicles had greatly increased. As to the vehicles that crossed this bridge on that day, going south, the average per hour was over 129, while the number crossing between 6 and 7 was seventy-seven only, and the average number of street cars and loaded omnibusses per hour was seventeen, and the number crossing between 6 and 7 was ten. So, going north over same bridge same day, the average number of vehicles per hour was 179, and the number between 5:30 and 6:30 was only 160. (Fol. 64.)

The evidence as to travel across other bridges than Wells and Randolph is that at Clark street June 16, 1881, during thirteen hours there passed south across the bridge

8,820 foot passengers and 410 horse cars, and north 7,079 foot passengers and 394 horse cars; that at same bridge April 24, 1882, between 6 and 7 A. M., there were 1,400 parsengers carried south in horse cars and between 5:30 and 6:30 P. M. there were 2,278 passengers carried north. (Fol. 67.)

And at Madison street, June 18, 1881, there passed east 6,800 foot passengers and 700 horse cars during the whole day, and 7,250 foot passengers and 760 horse cars going west.

On this day Randolph street bridge, the next one north, being broken, was not used at all. (Fol. 63.)

That on May 1, 1882, at same bridge, there passed fifty-one horse cars, with twenty-six passengers each, going east between 6 and 7 A. M., and eighty-four horse cars with forty-two passengers each, going west, between 5:30 and 6:30 P. M. These are the two bridges across which there is the greatest amount of travel of any in the city, and this is all the definite evidence there is as to number of pedestrians and passengers in street cars passing over them. (Fols. 67 and 68.)

That at State street bridge, the one next east of Clark street, only 180 passengers went south in street cars between 6:30 and 7 A. M., and 689 north between 5:30 and 6:30 P. M. on April 25, 1882. And this is all the evidence there is as to any travel over that bridge. (Printed Record, fol. 67.)

That over Throop street bridge for the hour it was closed in the evening, only seventeen vehicles and about seventy-five foot passengers crossed, and a vessel was detained by it during the hour. (Fol. 38; original 87.)

And as to Chicago avenue bridge, July 9, 1881, be-

tween 5:30 and 6:30, a passenger on a steam tug waited about half an hour for the bridge to close, during which time one vehicle and twenty-three persons went over the bridge. (Fol. 40; original 87.)

And whether there was any travel or not, all the bridges were closed promptly when the time came, and would not be opened even to let a sinking vessel be taken to the dry dock. (Printed fol. 34; original 81.)

If this evidence shows such a necessity for the closing of all the bridges during the time in question, as to give the appellee the power, under state authority, to totally obstruct navigation upon the river for such a length of time, it shows that there may not be any limit to such power. If public necessity of the character here shown is to be the standard by which this question is to be determined, how long before we may look for a total destruction of commerce upon this river?

The class of travel over these bridges on account of which the greatest necessity for their being closed exists, is pedestrians going from their homes to their work or places of business and returning. They are principally laboring men who reside upon the opposite side of the river from where they work. They, as appellee shows by its evidence, leave their homes at about fifteen minutes before 7 o'clock in the morning, and that when detained at all at the bridges it is only for three or four minutes on an average. They are required to be at their work at 7 o'clock, but is it so serious a matter for them to either start five minutes earlier or go one block to a tunnel, as they may do, that the whole commerce upon the river must be totally suspended?

In 1881, thirteen thousand and twenty-six vessels arrived at the port of Chicago, bearing four millions, five hundred

and thirty-three thousand five hundred and fifty-eight tons of freight, while nearly as many vessels cleared from said port, with a tonnage of over four millions, five hundred thousand.

And now it is urged that this vast and important commerce by water transportation, shall be absolutely suspended for two hours each day, and all vessels engage in it be prohibited from entering the harbor, or from moving up or down the river, in order that a few hundred, more or less, daily laborers may pass at pleasure across the bridges. If the enforcement of this so called hour ordinance should be enjoined there would still be left the "ten minute" ordinance under the operation of which no person would in any event be detained longer than ten minutes, and on an average, the time of detention is but five minutes. (Printed Record, fols. 64–5–6.)

It is submitted that no very serious inconveniences are likely to result by an abandonment of this hour ordinance and restoring the ten minute ordinance during the two hours in question.

PERMANENT OBSTRUCTIONS.

Another branch of the case pertains to certain bridges and bridge piers in the center of the channel of the river, which are permanent obstructions to its navigation, for the reason that the river is not of sufficient width to be thus divided into two channels.

These piers are upwards of thirty feet in width, and some two hundred feet or over in length, leaving a channel so narrow on each side that several of the vessels of the Goodrich transportation company cannot get through

at all, and so narrow that the appellant's three propellers are necessarily put to an extra expense of thirty-three dollars for every time either of them passes up or down the river, for towing, the aggregate amount of which, during the year 1881, was over five thousand dollars. (Printed Record, fols. 21, 29 and 33; original 70, 79 and 49.)

These draws are quite too narrow to permit any two of the ordinary sized vessels upon the river to pass each other therein, or to pass a vessel lying at any of the docks opposite these bridge piers. (Printed Record, fols. 23 and 38; original 59 and 86.)

The difficulty of passing through these narrow draws is greatly increased in consequence of the use and occupation of the banks of the river opposite these piers. At the Illinois Central Railroad bridge, at the very entrance to the river, this embarrassment has become very serious, and threatens to become so much more so as to practically prevent any vessels of ordinary size from entering the river at all. Now they can very seldom pass through the north draw, and, under the existing state of affairs, no reason is seen why the south draw may not at any time be obstructed in the same manner. (Printed Record, fols. 27 and 28; original 65 and 66.)

The same difficulty exists as to the bridges on the south banch, and particularly at Harrison street.

The width of the pier on which the bridge here rests is thirty-four feet. It extends south and up the river seventy-five feet beyond the south line of the street, and north down the river the same distance beyond the north line of the street, so that opposite each end of this pier, and on each side is private dock property for seventy-

five feet at each of four different places. At this bridge the east channel is the one mostly used, the west one being obstructed so that the larger vessels do not pass through; the narrowest point is fifty-five or sixty feet, and 160 feet north of the north end of the bridge pier there is a bend in the river at a narrow place. (Printed Record, fols. 24, 62 and 38.) This bend and narrow place, so near the end of the bridge pier makes it much more difficult to pass and repass, besides greatly increasing the danger of causing damage.

On the east bank a stone company has a dock up to the bridge which is usually filled with coal boats, and appellant's propellers have to sheer over so close to the bridge pier that they frequently strike against spring piles which causes a rebound, and appellant has been put to a great deal of expense for damages which it has had to pay. (Printed Record, fol. 24.)

At Archer avenue is another of the bridges that appellant's propellers have to pass, and they suffer a great deal of detention there, from the fact that there is only one draw that can be used. (Printed Record, fol. 25.)

The channels here are but fifty-eight feet in width, while the pier occupies over thirty-four feet. (Fol. 61.)

At Halsted street bridge, and also at Main street, the draws are only from forty-five to forty-seven feet, at Twenty-second street fifty-six feet, and at Fuller street fifty feet. Such are the widths of some of these channels. (Fol. 61.) The appellee, however, claims by its answer (Printed Record, fol. 15), that these two channels on each side of the piers are together of greater width than was the natural channel of the river. This claim is based upon the theory that from [illegible]ty-five to fifty feet on each side

of the river was sloping bank, and was not, in fact, a part of the "channel." It attempts to show this by the witness Wolcott. (Printed Record, fol. 59.)

Although the river may not have been of equal depth from bank to bank, yet it was not so shallow next to the banks as that vessels would get aground. There was no difficulty on that account. (Printed Record, fols. 23, 39 and 40.)

The exact slope of the banks of this river in its natural condition is not very important. The law undoubtedly is, that where a river is a public highway, it is such its whole width from bank to bank, although some portions may be too shallow to float some vessels, just as a street is none the less a highway because it is not worked and fit for use in its whole width.

In the case of *Kean* v. *Stetson*, 5 Pick., 495, it was held that the whole river included within high water mark on each side, was a public highway.

(See also, *Mayor of Colchester* v. *Brooke*, 9 Q. B., 339. Coulson & Forbes on Law of Waters, 413-4-5.)

But suppose that the original width of the channel of the river was not any greater than the combined width of the two present channels on each side of these piers, it exceeds that width now by at least the width of that pier, which is from thirty-three to thirty-five feet, and the fact that its natural and somewhat sloping banks have been dredged deeper and docked, makes it none the less a public highway its entire width. Such would still be the case even though it had actually been widened. All the dredging that the appellee ever did on the south branch has been below Harrison street. It has not done a particle above or south of that point where these bridges are with

draws of fifty feet and less. (Printed Record, fol. 60; original fol. 127.)

That these bridge piers, in the center of this already overcrowded public highway, are material, and hence unlawful obstructions, needs no argument to demonstrate. The evidence that they do greatly hinder, delay and increase the expense and danger of navigation, besides actually excluding certain vessels, is conclusive and uncontradicted. (See deposition of Appellants' witnesses, Printed Record, fols. 21, 28, 31 and 33 to 41.)

For the erection or continuance of these piers in the manner shown, the appellee has not even the excuse of necessity.

Admitting that a necessity exists for bridges at these streets, across the South Branch, there has been no attempt to show that it was necessary to construct them with these piers in the very center of the river, while on the other hand appellant has shown that a draw bridge may be constructed without a center pier. (Printed Record, fol. 30; original 72.)

If these bridges are to stand upon center piers, the river should have been widened opposite thereto until the draws were of sufficient width to accommodate the vessels passing through them—draws as capacious as are those at Clark and Wells street bridges, over the main branch. Again, the use of the adjacent banks of the river for docks should not be allowed to obstruct the draws to the detriments of navigation through them. The appellee probably has it in its power to acquire title, by condemnation or otherwise, to the requisite strip of land on the adjacent banks of the river, so as to control its use and excavate such portions as might be necessary.

It could either do that or construct more tunnels. All that, however, has but little bearing upon this case, except it shows that it was wholly unnecessary to have created these narrow draws at these bridges across the said south branch.

The bridges, however, are there constructed in the manner shown, and, whether opened or closed, constitute unlawful obstructions to an important inter-state commerce upon navigable waters of the United States. And the conduct of the appellee in maintaining said obstructions, as well as in enforcing said ordinance for the closing of all the bridges within the city, is both oppressive and arbitrary, and presents a proper case for the interposition of a court of chancery.

A. T. Britton,
J. H. McGowan, and
Homer Cook,
For Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 1057.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY,

Appellant,

vs.

THE CITY OF CHICAGO,

Appellee.

Supplemental Brief for Appellant.

A. T. BRITTON,
J. H. McGOWAN,
HOMER COOK,
Solicitors for Appellant.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1883.

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Reply to Argument for Appellee.

Upon the questions of law involved we understand the counsel for appellee to maintain, in substance, that the common law rule prevails in Illinois, so as to make the Chicago river not legally navigable, though *de facto* navigable; that a distinction in principle exists between navigable streams situate entirely within the boundaries of a State and streams only partially so situate, or bordering thereon; and that the exercise of municiple power in constructing the bridges alleged to be a nuisance, and in enacting the closing ordinances complained of, must be sustained, unless directly incompatible with, or repugnant to, some express act of Congress.

As matter of fact, appellee contends, that upon the proofs the bridges and ordinances complained of do not occasion such unreasonable obstruction to navigation, as to constitute a nuisance, which can be removed by decree.

It is true that the earlier decisions of this court, in case of *The Thomas Jefferson*, 10 *Wheat.*, 428, and in *The Steamboat Orleans* v. *Phœbus*, 11 *Pet.*, 175, followed the English rule, that the legal navigability of streams was measured by the flux and reflux of the tide.

But it is also true that a different rule has uniformly prevailed in this country since the decision of this court in 1851, in case of *The Genessee Chief*, 12 *How.*, 443, and that the settled law now is, as therein stated, that "if the water "was navigable, it was deemed to be public;" or, as was more fully stated in case of *The Daniel Ball*, 10 *Wall.*, 557:

"Those rivers must be regarded as public navigable rivers "in law which are navigable in fact; and they are naviga- "ble in fact when they are used or are susceptible of being "used in their ordinary condition as highways for commerce, "over which trade and travel are or may be conducted in the "customary modes of trade and travel on water. And they "constitute navigable waters of the United States within the "meaning of the acts of Congress, in contradistinction from "the navigable waters of the States, when they form in their "ordinary condition by themselves, or by uniting with other "waters, a continued highway over which commerce is or "may be carried on with other States or foreign countries in "the customary modes, in which such commerce is con- "ducted by water."

And that the constitutional authority of the United States equally extends over navigable waters *infra corpus comitatus* has been settled since the decision of this court in *Waring* v. *Clarke*, 5 *How.*, 441, and which doctrine was affirmed in *The Steamer Magnolia*, 20 *How.*, 296.

Under these decisions it is clear, that the Chicago river is in law navigable waters of the United States, if navigable in

in fact; and that whatever limitation may generally restrict the power of the State of Illinois to obstruct navigable waters for municipal or police purposes is fully applicable to this navigable stream, although it lies entirely within the boundaries of the State. That the Chicago river is navigable "is a historical fact, which all courts may recognize. "For many years the commerce upon it has been regulated "by Congress, under the commercial power, by establishing "ports, requiring vessels which navigate it to take out "licenses, and to observe certain rules for the safety of their "passengers and cargoes. Appropriations by Congress "have been frequently made to remove obstructions to "navigation from its channel."

Wheeling Bridge Case, 13 *How.*, 518.

It is also in proof that as early as 1835 and 1842 it was navigated in its natural condition, and as far up as the south fork of the south branch (substantially the present *locus* of the docks of the Union Iron and Steel Company) by heavily-loaded vessels, drawing from seven to eleven feet of water; that the average depth of water in any part of the river up to aforesaid point was then sixteen feet, and that vessels one hundred feet long were then easily turned round in said channel.

The bill shows, and the proofs sustain the averment, that "the Chicago river and its branches are navigable waters "leading into Lake Michigan, and are, and for a long time "have been, common public highways, free to all the inhabi-"tants of the United States," and over which there has long been carried on in extraordinary volume "commercial in-"tercourse between the citizens of one State and the citi-"zens of other States."

We may safely assume then that the Chicago river, being navigable *de facto* in its natural condition, is navigable in

law; and that as it forms, in connection with Lake Michigan and other navigable waters, a highway upon which a great commerce is conducted between different States, it falls under the control of Congress under its constitutional power over commerce.

We concede the general power of the State to construct highways within its borders, and that it includes the bridging of streams, whether navigable or not. But as that power must necessarily be exercised in subordination to the constitutional power of the United States to regulate commerce, the question remains what, if any, limitation does that constitutional provision impose upon the power of the State for municipal or police purposes to obstruct the free navigation of navigable waters?

This question has been repeatedly discussed by this court.

In *Gibbons* v. *Ogden*, 9 *Wheaton*, 1, it was decided that commerce meant something more than traffic, and that "it "describes the commercial intercourse between nations and "parts of nations in all its branches." The court clearly indicated the *opinion* that the control of this commercial intercourse was exclusively lodged in Congress, and was not retained in any form in the States; but as in the case at bar Congress *had* exercised the power, the *decision* was confined to the question, "Can a State regulate commerce with "foreign nations and among the States, while Congress is "regulating it?" That question was answered in the negative.

In the *Blackbird Creek Marsh case*, 2 *Pet.*, 245, it was held, that a law of the State of Delaware which authorized the placing of a dam across a small, but tide-water, creek was valid, because the constitutional power of Congress to regulate commerce with foreign nations and among the several States had "not been so exercised as to affect the question."

In *Cooley* v. *Board of Wardens of Port of Phila.*, 12 *How.*, 299, this court decided:

"It is the opinion of the majority of the court that the "mere grant to Congress of the power to regulate com- "merce did not deprive the States of power to regulate "pilots, and that although Congress has legislated on this "subject, its legislation manifests an intention, with a single "exception, not to regulate this subject, but to leave its "regulation to the several States. To these precise ques- "tions, which are all we are called on to decide, this opinion "must be understood to be confined. It does not extend to "the question what other subjects, under the commercial "power, are within the exclusive control of Congress, or "may be regulated by the States in the absence of all Con- "gressional legislation; nor to the general question how "far any regulation of a subject by Congress may be deemed "to operate as an exclusion of all legislation by the States "upon the same subject."

In the *Wheeling Bridge case*, 13 *How*, 518, it was held, that *any* obstruction to the free navigation of the Ohio river was unlawful, except by the consent of Congress; and that Congress having appropriated the field, both by the enactment of laws "for licensing vessels, establishing ports of "entry, imposing duties upon masters and other officers of "boats, and inflicting severe penalties for neglect of these "duties, by which damage to life or property has resulted," *and* Congress having also expressly sanctioned the compact between Virginia and Kentucky for the free navigation of the Ohio river to all citizens of the United States, the power of the State of Virginia was restrained from obstructing the free navigation of the river by the erection of a bridge thereover within her own limits.

By a subsequent act of Congress this bridge was declared to be a lawful structure and was made a post-road, and thereupon, in 18 *How.*, p. 421, this court held:

"So far, therefore, as this bridge created an obstruction to "the free navigation of the river, in view of the previous "acts of Congress, they are to be regarded as modified by "this subsequent legislation; and, although it still may be "an obstruction in fact, is not so in the contemplation of "law."

In *Mississippi & Missouri R.R. Co.* v. *Ward*, 2 *Black*, 485, it was held, that whether a bridge was such an unreasonable obstruction to navigation as to constitute a nuisance that a court of chancery could remove, must be determined upon the same rule which a court of law would act upon in trying an indictment for the same nuisance.

In *Gilman* v. *Philadelphia*, 3 *Wall.*, 713, it was held that, in the absence of legislation by Congress, an act of the State of Pennsylvania, which authorized the construction of a bridge over the Schuylkill river, was not repugnant to the commerce clause of the Federal Constitution.

In *Passiac Bridge case*, 3 *Wall.*, 782, this doctrine was affirmed by a divided court. The opinion of the circuit court, thus affirmed, held—

"That every bridge is an obstruction on the channel of a "river, but is not necessarily a nuisance. Whether it is a "nuisance or not, is a matter for legislation, and not judicial "discretion. The police power to make bridges over its pub-"lic rivers is as absolutely and exclusively vested in a State "as the commercial power is in Congress; and no question "can arise as to which is bound to give way when exer-"cised over the same subject-matter, till a case of actual col-"lision occurs."

This opinion further intimates that Congress has no power to regulate the erection of bridges, nor to assume to license their construction when situate wholly within the boundaries of a State; that such power had at least never been asserted in any act of Congress for seventy years, excepting the

"doubtful precedent of the Cumberland road;" and that the State, in the exercise of her absolute sovereignty over the river, might stop it up altogether.

In *Crandall* v. *State of Nevada*, 6 *Wall.*, 35, it was held:

"Perhaps no more satisfactory solution has ever been given "of this vexed question than the one furnished by the court "in that case. (Cooley *v.* Board of Wardens.) After show- "ing that there are some powers granted to Congress which "are exclusive of similar powers in the States, because they "are declared to be so, and that other powers are necessarily "so from their very nature, the court proceeds to say that "the authority to regulate commerce with foreign nations "and among the States includes within its compass powers "which can only be exercised by Congress, as well as powers "which, from their nature, can best be exercised by the State "legislatures, to which latter class the regulation of pilots "belongs. Whatever subjects of this power are in their "nature national, or admit of one uniform system or plan of "regulation, may justly be said to be of such a nature as to "require exclusive legislation by Congress. In the case of "Gilman *v.* Philadelphia this doctrine is reaffirmed, and "under it a bridge across a stream navigable from the ocean, "authorized by State law, was held to be well authorized, in "the absence of any legislation by Congress affecting the "matter."

In *The Clinton Bridge*, 10 *Wall.*, 454, it was held, that the question whether it was competent for Congress, under its power to regulate commerce, to interfere in pending litigation and to legalize the construction of a bridge, had been settled in the affirmative in the Wheeling Bridge case.

In *Railroad Company* v. *Fuller*, 17 *Wall.*, 560, it was held:

"In the complex system of polity which exists in this "country, the powers of government may be divided into

"four classes. * * * And those, which may be exer-
"cised by the States, but only until Congress shall see fit to
"act upon the subject.

"The authority of the State then retires and lies in abey-
"ance until the occasion for its exercise shall recur. * * *
"Where a stream, navigable for the purposes of foreign or
"interstate commerce is obstructed by the authority of a
"State, such exercise of authority may be valid until Con-
"gress shall see fit to intervene. The authority of Congress
"in such cases is paramount and absolute, and it may com-
"pel the abatement of the obstruction, whenever it shall
"deem it proper to do so."

In *South Carolina* v. *Georgia et al.*, 3 *Otto*, 4, it was held that—

"The power of Congress to regulate commerce includes
"the regulation of intercourse and navigation, and conse-
"quently the power to determine what shall or shall not be
"deemed *in the judgment of law* an obstruction to navi-
"gation."

In *Pound* v. *Turck*, 5 *Otto*, 459, it was held that—

"In the absence of legislation by Congress bearing upon
"the case, a statute of a State which authorizes the creation
"of a dam across a navigable river which is wholly within
"her limits is not unconstitutional."

In *Wisconsin* v. *Duluth*, 6 *Otto*, 379, it was held:

"And whilst this court has maintained in many cases the
"right of the States to authorize structures in and over the
"navigable waters of the States, which may either impede
"or improve their navigation, in the absence of any action by
"the General Government in the same matter, the doctrine
"has been laid down with unvarying uniformity that, when
"Congress has by any expression of its will occupied the
"field, that action was conclusive of any right to the con-
"trary asserted under State authority."

In *Transportation Co.* v. *Chicago*, 9 *Otto*, 365, it was held:

"Yet the river is a highway, a State highway as well as "a national. It has long been held that navigable rivers "wholly within a State are not outside of State jurisdiction "so long as Congress does not interfere."

In *County of Mobile* v. *Kimball*, 12 *Otto*, 691, it was held:

"State legislation is not forbidden touching matters either "local in their nature or operation, or intended to be mere "aids to commerce, for which special regulations can more "effectually provide, such as harbor pilotage, beacons, buoys, "and the improvement of harbors, bays, and navigable "rivers within a State, if their free navigation under the "laws of the United States be not thereby impaired. Con- "gress, by its non-action in such matters, virtually declares "that for the time being, and until it deems fit to act, they "may be controlled by State authority."

In *Bridge Co.* v. *United States*, 15 *Otto*, 470, it was held that—

"The paramount power of regulating bridges that affect "the navigation of the navigable waters of the United "States is in Congress."

In *Columbus Ins. Co.* v. *Curtenius*, 6 *McLean*, 209, it was held that Congress has declared, by the ordinance of 1787, and otherwise, that the navigable tributaries of the Mississippi were free and common highways to the citizens of the United States, and that therefore an act of the legislature of Illinois authorizing the construction of a bridge across the Illinois river was void, if such a bridge was a material obstruction to the navigation of said river, as being in con-

flict with the Federal legislation declaring it free and common.

In *Hatch* v. *Wallamet Iron Bridge Co.*, 7 *Sawyer*, 127, the circuit court for the district of Oregon, after reciting the act of Congress licensing coasting vessels, and the act of 1859 guaranteeing to all citizens of the United States the free navigation of the rivers in Oregon, held:

"The power to authorize the erection of a bridge over a "navigable water of a State, for the convenience of the in- "habitants thereof, belongs to the State as a part of its gen- "eral police power. Congress does not possess this authority "directly, *eo nomine*, but its control over the navigable "waters of the States as a means of commerce gives it a "practical veto upon the power of the State in this respect. "Therefore no State can authorize or maintain the erection of "a bridge over a navigable water which in effect contra- "venes or conflicts with a law of Congress concerning the "navigation of the same. And the fact that such water is "wholly within the State is immaterial, if it is accessible "from another State or forms a part of a navigable way "between itself and other States.

"If then this bridge, in its construction or effect, is in "conflict with either of these acts of Congress, it is so far "unlawful, and if injurious in its operation to the rights of "the plaintiffs, is a nuisance, and may be prevented or "abated. But if it does not contravene such law, then, "however it may inconvenience or obstruct the navigation "of the river, this court cannot interfere. The power of "Congress to regulate the navigation of the river does not "execute itself, nor can this court enforce it until Congress "has declared its will on the subject. Until then the power "is dormant, and the authority of the State is sufficient to "justify any structure or obstruction that may be placed "therein."

These citations substantially outline the Federal adjudications upon the power of the States to authorize the construction of bridges over navigable waters within their lim-

its. The question has been a much vexed one. In view of the numerous dissenting opinions in this court; of the fact that the court has so frequently announced its conclusion with avowed caution and restricted its opinion to a particular issue; that its affirmance of State power has usually been in cases of insignificant streams, where commerce was a theory rather than a fact; that in the case of streams of recognized commercial value it has always gone far towards treating *any* legislation of Congress which tended to the occupation of the field as a restraint upon the power of the States; that the decision in the Blackbird Creek Marsh case, which has stood as authority for the subsequent cases, was made when the constitutional provision was supposed to be limited to tidal waters, and was applied to one of the original States not affected by the ordinance of 1787 and its resulting legislation, there is fair room for argument that the constitutional provision relative to commerce is self-executing so far as to inhibit the erection under State authority of any structures over navigable streams which shall in fact be an unreasonable obstruction to free navigation. Commerce, in the sense of the Constitution, means navigation, intercourse, and all the appliances and facilities necessary for the practical enjoyment thereof. The power to *regulate* same is lodged exclusively with Congress, and is not concurrent with the States. The latter may bridge streams, tunnel under them, dredge them, build docks upon them, but that is merely the exercise of municipal or police power. It is in no sense a *regulation* of commerce, although it may incidentally affect same. So long as the State, in the exercise of this police power, does not impede or obstruct navigation, it is not apparent where Congress would derive power to interfere with the State work; but, on the other hand, when the State, in the exercise of its power, impedes or obstructs foreign or inter-state commerce, *eo instante* she

intrudes upon a power wholly reserved to the General Government. Her act then becomes void, not simply because it conflicts with a particular act of Congress, but primarily because it conflicts with the Federal Constitution in its reservation of power over that subject to the General Government. The power of the State to make certain uses of the navigable waters of the United States is quite distinct from the power to regulate commerce. The decisions of this court recognize this distinction, of which the counsel for appellee seems to have lost sight. It is a police power in the State, which cannot invade the domain of the National Government. Whenever its attempted exercise is carried to such a point as to absolutely exclude or unreasonably obstruct inter-state or foreign commerce over navigable waters it fails *from that fact;* or, as it was stated in *Henderson et al.* vs. *Mayor of the City of New York et al.*, 2 *Otto*, 259, "it is void, no matter under what class of powers it may "fall, or how closely allied it may be to powers conceded to "belong to the States."

This doctrine is in entire harmony with the principles announced by this court in *Railroad Co.* v. *Husen*, 5 *Otto*, 465, and the cases therein cited. The State legislation therein discussed was held void, not because it conflicted with a particular act of Congress, but because it, *per se*, worked a *destruction* of interstate commerce. And such result would follow with equal logical force whether the State law unreasonably excluded the subject-matter of transportation or destroyed or unreasonably obstructed the means and agencies of transportation. To block up and practically destroy the ways over which commerce passes is a more radical destruction of the constitutional prerogative than to limit or exclude certain subject-matters of traffic.

But whatever ground may be found for distinguishing between the self-executing capacity of the Federal Constitu-

tion in the matter of State legislation obstructing the *ways* of commerce, and State legislation obstructing the *subject-matters* of commerce, a rule of limitation upon the power of the State to obstruct the navigation of navigable streams, by bridges or otherwise, is clearly deducible from the repeated decisions of this court.

That rule is that when a bridge over navigable waters of the United States, in its construction or effect, is in conflict with any act of Congress, it is so far unlawful; and if injurious to the rights of parties complaining, is a nuisance, and may be prevented or abated.

It does not require, as is contended by counsel for appellee, that there should be specific legislation by Congress, prohibiting in terms the construction of the bridge. That would be the strongest form of asserting the will of Congress. It is sufficient if Congress has *in any form* asserted its constitutional power over the subject-matter. The power of the State to legislate upon the same subject then ceases—so far, at least, as it does or may conflict with the purposes or effect of the will of Congress.

We shall later on discuss the question of fact; but assuming that the State legislation does obstruct the free navigation of the Chicago river, we enquire into the character of congressional legislation, which will oust or limit the police power of the State.

In the *Wheeling Bridge case* 13 *How.*, 518, this court held that whilst Congress had not, in terms, forbidden the State, by bridges or otherwise, to obstruct the navigation of the Ohio river, yet that its legislation in licensing vessels, establishing ports of entry, imposing duties upon officers of boats, inflicting penalties, as well as its sanction of the compact between Virginia and Kentucky as to the free navigation of the river by all citizens of the United States, was

the precise equivalent of such prohibition. As was therein said, "an obstructed navigation cannot be said to be free."

In the *Clinton Bridge case*, 10 *Wall.*, 454, an act of Congress legalizing a bridge, and declaring it to be a post-road, was sustained as an occupation of the field under the power to regulate commerce.

In *South Carolina* v. *Georgia et al.*, 3 *Otto*, 4, an appropriation by Congress "for the improvement of the harbor "of Savannah," was held sufficient to oust the State power to interfere.

In *Wisconsin* v. *Duluth*, 6 *Otto*, 379, an appropriation by Congress for the improvement of the harbor at Duluth was such an exercise of its constitutional power under the commerce clause as to exclude the State of Wisconsin from power to interfere with or to obstruct the work.

In *Columbus Ins. Co.* v. *Curtenius*, 6 *McLean*, 209, the declaration by Congress that the navigable tributaries of the Mississippi should be free and common highways to the citizens of the United States was held to invalidate State legislation which obstructed the navigation of the river by a bridge.

In *Hatch* v. *Wallamet Iron Bridge Co.*, 7 *Saw.*, 127, the court considered the alleged conflict between a State law authorizing the bridging of the river and an act of Congress of February 14, 1859, which declared "that all the naviga- "ble waters of said State shall be common highways and "forever free, as well to the inhabitants of said State as to "all other citizens of the United States, without any tax, "duty, toll, or impost therefor." The court held the State act to be void, and, citing the decisions in 13 *How.* and 6 *McLean* (*supra*) said:

"These decisions are the authoritative and uncontradicted "expositions of the effect of Federal legislation declaring a

" navigable river forever free and common to the citizens of " the United States upon the otherwise unlimited power " of a State to obstruct or impede the navigation thereof " within its own limits. And the reasoning upon which " they rest seems unanswerable. It is self evident that a " river cannot be a common highway, forever free to all the " citizens of the United States, which the legislature of any " one State has the power to essentially obstruct."

Now all the conditions of Congressional action mentioned in any or all of these decisions exist and are applicable to the case at bar. Vessels have been licensed; a port of entry has been established to include the harbor of Chicago, and which harbor, by act of the Illinois legislature of Feb'y 14, 1851, (Record, p. 55,) " shall include the piers and so much " of Lake Michigan as lies within the distance of one mile " thereof into the lake, *and the Chicago river and its* " *branches to their respective sources;*" duties have been imposed upon masters and other officers of boats; moneys have been appropriated to improve the harbor and to build a lighthouse, and over and over again it has been positively enacted that the river shall be deemed to be and remain a public highway, free to all the citizens of the United States. All these legislative enactments are collated on pp. 24 to 30, inclusive, of our original brief, and hence are not here repeated.

The only remaining question, then, is one of fact, viz: Whether the bridges and the closing ordinances complained of do constitute in their construction or effect a material obstruction to the free navigation of this public highway for interstate and foreign commerce?

AS TO THE BRIDGES.

Whatever power the city may have to construct bridges and regulate the use thereof it derives from the State.

What is known as the old charter undertook to bestow upon the city the power "exclusively to erect and con- "struct, or permit, or cause, or procure to be erected and "constructed, float, pivot, or draw bridges over the naviga- "ble waters within the jurisdiction of said city, and keep the "same in repair, *said bridges to have draws of suitable* "*width.*"

By a later act the city was authorized "to construct and "keep in repair bridges, *viaducts, and tunnels*, and to regu- "late the use thereof."

In the exercise of the power supposed to be granted by these acts and others the city has built on the main branch of the Chicago river four bridges, and on the south branch, and south fork of the south branch, something like twenty-five more, and many others on the north branch—all within the corporate limits of the city. These are what are known as drawbridges, each constructed on a central pier, located about the middle of the stream. The city has also passed, and is enforcing, an ordinance by which all these bridges are closed, each week-day, from six until seven o'clock in the morning, and from five and a half to six and a half in the evening. Also an ordinance prohibiting the draws from being open more than ten minutes at a time during the day between the morning and evening hours mentioned.

The appellant complains (1) that the piers and other parts of the structure of these bridges constitute a material and unwarrantable obstruction, and (2) that arbitrarily closing the bridges, as provided in the ordinances, is a violation of its right to the free use of these navigable waters. It especially complains of the Harrison-street bridge, on the south branch, and all the other bridges above it.

A vessel of the appellant, entering the mouth of the river, ust, in order to unload its ore at the docks of the Iron and Steel Co., on the south fork, pass more than twenty of these

city bridges. If it is one of the smaller vessels owned by appellant, it will pass the first nine bridges, until it reaches the one at Harrison street, without much difficulty on account of the piers. From that point up the south branch and the south fork of the south branch it is alleged and proven that the piers are a serious and dangerous obstruction to navigation.

It is also in proof that the south branch and south fork were originally navigable streams. In 1845 Capt. Owen was able, when the wind was fair, to sail his schooner, loaded with 30 cords of stone and drawing 9½ feet of water, from the mouth of the Chicago river to the mouth of the south fork of the south branch. (Record, fols, 53, 54.) He made 12 trips during that summer, and knew of the brig Scott making 15 similar trips, carrying fifty cords of stone and drawing 11 feet of water. (*Ib.*). Owen's vessel was about 26 feet beam and between 95 and 100 feet long. He was able to turn her round where he unloaded, and had no difficulty in passing the Scott, which was a larger vessel, when they met in the stream. (Record, fol. 55.) There was at this time 16 feet of water in the channel of the south branch. (Fol. 56.)

Thos. L. Parker testifies that in 1842 he ran a vessel up the south branch. It then had from 12 to 14 feet of water, and they could wind a vessel 138 feet long above Jackson street. (See fol. 88.) Rob't Clidesdale (fol. 90) also testifies that the south branch was navigable in 1835.

Now, by reference to defendant's Exhibit No. 1, which is a map of an official survey made of the south branch in 1822, it will be seen that the average width of that stream from Madison street to Main street was 118 feet. It is also in evidence without controversy that neither the city nor the General Government have ever done any dredging above Harrison street. Defendant's witness, Alex. Wolcott, who

has held the office of county surveyor of Cook county for twenty-six years, and known the Chicago river ever since 1834, testifies (fol. 125) that the citizens had docked the river and its branches, *but the city had done the dredging.* In fol. 127 he says the dredging on the south branch was between Harrison street and the main river. This is the evidence referred to by counsel for the appellee apparently to show that the city and citizens had dredged the river above Harrison street. It shows exactly the reverse—that they did nothing of the kind.

From Harrison street to the mouth of the south fork there are about ten bridges with piers over 30 feet wide and from 100 to 200 feet long, lengthwise of the stream, and placed in the middle of the same.

It requires no further statement of fact, and no argument, to show that here is a very material obstruction to navigation. Suppose, for instance, that the bridges were no longer needed and should all be removed, leaving only these ten piers standing in the middle of this narrow stream: would it be contended for a moment that they were not a serious obstruction to be at once removed? Surmounted with the bridges, the obstruction is not lessened, but aggravated.

In 1845 two vessels, each with breadth of beam of 26 feet and upwards, could readily pass in this part of the river. When the wind was fair they could go to the mouth of the south fork by sail alone. Now all craft have to be towed up at an expense of $66 for the round trip, and at great risk of injury by reason of the piers. The uniform testimony of those who know best—the vessel-owners and officers of vessels actually navigating the river—is to the effect that the piers in question greatly increase the hazard and expense of running on the river, and materially retard the movement of vessels.

Admitting that the city had the right to bridge the river,

it must also be admitted that if the bridges could be made without obstructing its navigation it was the legal duty of the city to so construct. It is in evidence, without contradiction, that drawbridges can be successfully built without a middle pier. One is mentioned as in successful operation at Cleveland, with a draw 200 feet wide. No question of economy in construction will be allowed as against an obstruction to free navigation. Otherwise the city might find it cheaper to put in two or even three piers, and thus create a total obstruction. The authority from the State to the city was not to impede navigation, or in any sense obstruct commerce. On the contrary, the city was to build bridges with "draws of a suitable width," and to make regulations for opening the same for the passage of vessels. It was also authorized to construct tunnels. These acts looked to the protection of commerce on the river.

If by building tunnels or making bridges without a middle pier the wants of the public could be met, and navigation remain unobstructed, then the city was legally bound to exercise its authority in that way. It is no answer to this to say the people prefer to pass over the bridges rather than through the tunnels, because the latter are dark and the approaches thereto are uncomfortably steep. With a proper expenditure this could be remedied. Such a claim is begging the question. It is simply saying that the great city of Chicago has found it cheaper to bridge its river in an old-fashioned, clumsy way, and open the draws by man-power, even to the obstruction of national commerce, rather than by a liberal expenditnre, to build improved bridges with the draws operated by steam, and construct proper tunnels.

A State, in the exercise of its police power, will occasionally intrude upon the domain of Federal jurisdiction. But whenever the necessity for this occurs the intrusion must be the least possible. Otherwise the State, by a negligent or

vicious use of its authority, could rob the citizens of their constitutional rights. This principle is prominent in the *Wheeling Bridge case*, and several others which we have cited. Its application to the case at bar is apparent. Conceding the power claimed by Chicago, the record shows that it has been exercised in such way as to materially interfere with the free use of a navigable stream, when by a proper and legitimate increase of expenditure no such obstruction would have resulted.

AS TO THE ORDINANCES.

The effect of these ordinances was so fully discussed in our former brief, we shall have occasion to refer to but few points at this time.

Whatever may be the obstruction, resulting from the bridges and ordinances during the daylight, the record shows conclusively that in the dark the hazard is so great that vessel men only attempt to pass up and down the river at night in cases of emergency. The smoke of the city intensifies the darkness, curtails the hours of daylight, and thus adds to the risk. From these causes the movement of vessels on the river and its branches is practically confined to the hours of daylight. See the testimony of Ira Owen, Thos. Johnson, Stephen Green, Peter Peterson, Jno. Sweney, Geo. E. Merritt, and others.

The bridge ordinances commence to operate at six in the morning and continue until half past six in the evening—that is, during the space of twelve and one-half hours, virtually covering the whole of the daylight. During the first hour and last hour of this time, all the bridges remain closed. During the other ten and one-half hours they are closed one-half the time at intervals of ten minutes each. In other words, the city, with its bridges and ordinances, wholly ob-

structs navigation for seven hours and fifteen minutes out of the twelve and a half hours of daylight. This obstruction, during that time, is as complete as though the twenty-five bridges were twenty-five dams. From the construction of the bridges and the operation of the ordinances we then have this result: that during the eleven and a half hours of darkness of each day navigation is virtually defeated, and during seven and one-fourth hours of the daytime it is wholly obstructed. This leaves to the vessel men five hours and fifteen minutes each day in which to get their vessels into and out of the river, and move them from place to place, as their business requires. If this was a period of five consecutive hours the cause of complaint would be materially lessened. But the time is divided into intervals of ten minutes each, which greatly lessens its value to the boatmen. The jams, delays, and damages resulting from closing the bridges every ten minutes is fully stated by the witnesses. During the year 1881 upwards of thirteen thousand vessels arrived at the port of Chicago. Probably every one of these had occasion to pass over some portion of the river and its branches. The elevators, lumber-yards, coal-yards, and other places and facilities for loading and unloading boats are on the banks of these streams. Add to the thirteen thousand vessels mentioned the tugs and other craft constantly employed on the river, and it will be readily seen under the circumstances how material an obstruction these ordinances are.

The counsel for the appellee urges the facts that Chicago is the third manufacturing city in the country; that it is a great railroad centre, with a population approaching a million, as reasons why the travel and traffic on the river should give way to the travel and traffic over the bridges. Similar reasons were urged in the *Wheeling Bridge case*, but the court failed to see the potency of the argument. If the

railroads bring vast quantities of grain and other produce from the interior to Chicago, all the more need that the water facilities there be kept free from obstruction, that this freight may be carried cheaply to the seaboard. This may not be in the interest of railroads, but it is in the interest of the people generally; one of those interests which the Federal authority is charged with protecting. As the railroads multiply and the manufacturers and population increase the facilities for cheap transportation should be enlarged, not abridged.

Can the city of Chicago, under any power derived from the State, wholly close the river to navigation? It certainly can if the argument of the appellee is correct. If the present local needs warrant the closing of all bridges during seven hours of the day, it is only a question of time when they must be constantly closed. The logic of this doctrine would be to ruin the water ways of the country. It will not do to say that railroads can take care of our great inland commerce. The people are entitled to the benefit of water transportation, and no other interest should be allowed to encroach upon their rights in that regard. In the language of Justice McLean, "these great thoroughfares "provided by a beneficent Providence should neither be "neglected nor abandoned."

Under the Constitution, a citizen of Michigan has an equal right to the use of the waters of the Chicago river with the citizen of Illinois. Yet he has no voice in making the law and ordinances which authorize the bridges, and so regulate them as to deprive him of such constitutional right. He can only look to the Federal authority for his remedy.

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Solicitors for Appellant.

OFFICE SUPREME COURT U. S.
FILED
JAN 8 1883
JAMES H. McKENNEY, Clerk.

17-678

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, A. D. 1882.

No. 1057.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEE.

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Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

STATEMENT.

This is a bill seeking to enjoin the city of Chicago from closing the bridges over the Chicago river under the so-called "ten-minute" ordinance, and the "morning and "evening hour" ordinance, and to compel the city to remove the protections of all bridges which span the south branch of the river from Harrison street south.

The complainant is a corporation of the State of Michigan, and is the owner of a line of freight propellors engaged in carrying ore from Lake Superior to the docks of the Union Iron and Steel Company.

These docks are located on what is known as the south fork of the south branch of the Chicago river, near Thirty-second street, in the city of Chicago.

The defendant is a municipality organized and existing under and by virtue of the act of the general assembly of Illinois, in force July 1, 1872.

The Chicago river was naturally a small, sluggish stream flowing into Lake Michigan, a short distance east of what is now Rush street bridge. Its two branches, the north and south, are at the head of and at right angles to the main river, flowing in opposite directions. The river and its branches were of varying width, averaging from 100 to 125 feet. The banks sloped gradually, and the channel averaged from twenty-five to forty feet from either bank. So that the original channel was fifty to eighty feet less in width than the original distance from bank to bank.[1]

Along the banks of this river there has sprung up since 1837, the year of its incorporation, a city of 600,000 inhabitants.

The river lies wholly within the limits of the State of Illinois.

In the court below, the case was heard before Mr. Justice Harlan and Judge Blodgett upon pleadings and proofs. Mr. Justice Harlan announced that the press of business had prevented the preparation of any formal opinion covering the numerous and important questions discussed by counsel. But as the district judge and himself had reached a conclusion entirely satisfactory to themselves, and which was not likely to be changed by further consideration of the case, and that parties might not

[1] Transcript of Record, 59.

be delayed in taking the case to a higher court, if such be their purpose, he would announce that, in their opinion, the ordinance of the city is not in violation of the constitution of the United States, or of any act of congress, and that there is no cause of action against the city.

BRIEF.

The Chicago river is not, under the Illinois decisions, a navigable stream.

Middleton v. *Pritchard*, 3 Scam., 510.
Ensminger v. *People*, 47 Ill., 384.
City of Chicago v. *McGinn*, 51 Ill., 266.

By the decisions of the United States Supreme court, however, it is a navigable water of the United States.

Genesee Chief v. *Fitzhugh*, 12 How., 443.
Barney v. *Keokuk*, 4 Otto, 338.
The Daniel Ball, 11 Wall., 557.
The Montello, 11 Wall., 411.

Navigable waters of the United States, lying within the bounds of a state, are, in the absence of express prohibition by congress, entirely in the control of such state, and the state may delegate its power over such river.

The Commonweath v. *Breed*, 4 Pick., 460.
People v. *Rensselaer, &c., R. R. Co.*, 15 Wend., 113.
Wilson v. *Blackbird Creek Marsh Co.*, 2 Peters, 245.
Gilman v. *Philadelphia*, 3 Wall., 713.
The Passaic Bridges, 3 Wall., 782.
Flannagan v. *Philadelphia*, 42 Penn. St., 219.
Pound v. *Turck*, 5 Otto, 459.
Transportation Co. v. *Chicago*, 9 Otto, 643.

Heerman v. *Beef Slough Co.*, 8 Biss., 334.
United States v. *Beef Slough Co.*, 8 Biss., 421.

While the United States may regulate commerce on the Chicago river, the State of Illinois has concurrent jurisdiction, and the two jurisdictions do not conflict.

Crandall v. *Nevada*, 6 Wall., 35.
The Lottawanna, 21 Wall., 558.
Ex parte McNeil, 13 Wall., 236.
Case of the State Freight Tax, 15 Wall., 232 (page 249, opinion of court).
Railroad Co. v. *Fuller*, 17 Wall., 560.
Osborne v. *Mobile*, 16 Wall., 479.
Foster v. *Port of New Orleans*, 94 U. S., 248.

The State of Illinois has delegated its power over the river to the city of Chicago.

Rev. Stat. of Ill. (1881), Chap. 24, p. 218.

And all the acts complained of are authorized by the state.

Aside from the state's control over the river, which has been delegated to the city of Chicago, the bridges are erected for a public purpose; produce a public benefit; are in a reasonable situation; do not, when open, materially abridge the natural channel, and therefore are lawful structures.

Mississippi & Missouri R. R. Co. v. *Ward*, 2 Black., 485.
Williams v. *Beardsley*, 2 Carter, (Ind.), 591.

The rights of crossing and of navigating a public stream

are co-existent and correlative, and the ordinances are an equitable adjustment of these correlative rights.

Devoe v. *Penrose Ferry Bridge Co.*, 3 Am. Law Reg., 83.

Illinois River Bridge Co. v. *Peoria Bridge Co.*, 38 Ill., 467.

City of Chicago v. *McGinn*, 51 Ill., 266.

Packet Co. v. *Board of Trustees*, U. S. Supreme Court, October term, 1881, 4 Mor. Trans., 811.

The *onus* of proof is on the party alleging a nuisance.

Dutton v. *Strong*, 1 Black, 23.

ARGUMENT.

I.

THE STATE OF ILLINOIS HAS AUTHORIZED THE CITY OF CHICAGO TO DO ALL THE ACTS COMPLAINED OF.

Under the common law, as established by the courts of England, no stream is navigable except where it is subject to the ebb and flow of the tide. The reason of the law is evident. In the British Islands no streams, except in a few isolated cases, are navigable in fact above tide water; and tide water there is a fair criterion of the navigability of water.

The English law on this subject has been adopted by the courts of most of the eastern tide water states, and, with less reason, by those of Mississippi, Michigan and Illinois. The rule was followed by the Supreme court of the United States in

The Thomas Jefferson, 10 Wheat., 428.

In 1851, upon the question of admiralty jurisdiction being presented to this court in *Genesee Chief* v. *Fitzhugh*, 12 How., 443, *The Thomas Jefferson* was modified, and the jurisdiction was held to extend to the great lakes and rivers.

In *Barney* v. *Keokuk*, 4 Otto, 338 (1876), the court say:

"And since this court in the case of *The Genesee Chief*, 12 Id., 443, has declared that the great lakes, and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for

adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty."

In Illinois, however, the old rule still prevails, and the Chicago river is not legally navigable, at common law, so as to divert the title to its bed; yet, being *de facto* navigable, it is subject to a public easement of passage, the title to its bed remaining *ad filum aquae* in the adjacent proprietors.

Middleton v. *Pritchard*, 3 Scam., 510.
Ensminger v. *People*, 47 Ill., 384.
City of Chicago v. *McGinn*, 51 Ill., 266.

As to what waters are to be deemed navigable waters of the United States, and for what purpose, the case of *The Daniel Ball*, 11 Wall., 557, is usually considered as in point. In that case the question arose: Whether a steamer plying upon Grand river, in the State of Michigan was subject to the inspection and enrollment laws of the United States. The Supreme court of the United States (FIELD, J.) held, that for the purposes of that case Grand river was a navigable stream, being *de facto* navigable, and also that, as that river, by its connection with Lake Michigan, was accessible to vessels of other States coming upon the lake, it was, therefore, a navigable water of the United States, although lying within the State of Michigan; and the vessels plying upon it were subject to the rules and regulations prescribed by congress for the enrollment and inspection of such shipping. Of the same general nature was the case of *The Montello* 11 Wall., 411, in which case the same issue was presented, *i. e.*, whether a vessel plying upon the navigable waters tributary to Lake Michigan was subject to the enrollment and inspection laws of congress, and the same

conclusion reached. There is no doubt, therefore, that the power of congress to control and regulate commerce extends to all vessels plying upon any waters actually navigable, which from their nature, or their connection with other waters, afford a passage to vessels coming from other states or countries; and such waters are for that purpose to be considered as navigable waters of the United States.

But it will be observed that such an assumption has nothing to do with the power of a state to control such waters themselves, being entirely within its borders. The preceding cases deal with the inherent power in congress, under the constitution, and *exercised* by congress, in the way of enrollment, inspection and similar enactments, to regulate commerce between the states. Of entirely a different nature are the cases, in which the power of the states to regulate streams (navigable or not) entirely within their borders, are considered, with reference to the powers delegated by the constitution to congress.

It is one question whether congress *has* power, and *has* exercised it, to make rules governing vessels navigating waters of the kind referred to, in the States of Michigan and Illinois; but it is quite another as to whether congress has the power, and if so, as to whether such power *has been exercised*, to prevent those states from doing what their inherent sovereignty authorizes, as to such waters as lie entirely within the borders of the states themselves.

Assuming, then, that the Chicago river is legally a navigable stream and a navigable water of the United States, the question is: What power has a state over a navigable water of the United States lying wholly within the state lines?

The earliest authority upon the subject is the case of

The Commonwealth v. *Breed*, 4 Pick., 460.

It was there directly held that the state had power to authorize a positive interruption to a navigable arm of the sea lying within the state, even to the extent of authorizing a bridge with a draw too small to admit the passage of some boats which had been in the habit of navigating such waters. And it was held that the power to do this was inherent in the state, whenever public convenience commanded its exercise. To the same effect is the case of

The People v. *Rensselaer & S. R. R. Co.*, 15 Wend., 113.

In 1824 the first case directly in point came to the Supreme court of the United States, and it was then held that the State of Delaware could entirely dam up a navigable arm of the sea lying *within* the state.

Wilson v. *Blackbird Creek Marsh Co.*, 2 Peters, 245.

In that case the court (MARSHALL, C. J.,) said:

"This abridgment (the dam referred to), unless it "conflict with the constitution of the United States, is an "affair between the government of Delaware and its "citizens." * * *. "We do not think that act re- "ferred to can, under the circumstances of the case, be "considered as repugnant to the power to regulate com- "merce."

This was a case where the waters in question were legally navigable waters, and hence subject to all the conditions belonging to the same. The inlet was, however, entirely within the State of Delaware.

All doubts upon this question were settled by the important case of *Gilman* v. *City of Philadelphia*, 3 Wall., 713, in which the precise question was discussed in all its bearings, and the law regarding it settled by the Supreme court of the United States. That case arose upon a bill filed by an owner of property and dockage, situated upon the Schuylkill river, to prevent the city from erecting a bridge *without draws* over that stream. It appeared that the Schuylkill up to and beyond complainant's property, was tide water, and had long been navigable, and navigated by ships of from eighteen to twenty feet draft, and of all kinds, both coasting and foreign. That the proposed bridge would prevent all vessels with masts from proceeding beyond it, or from reaching complainant's property and docks. It appeared that the Schuylkill was situated entirely within the State of Pennsylvania, but of course, by its joinder with the Delaware, was open to vessels coming from other states or countries, and was besides a portion of the United States collection district of Philadelphia. The act of the city in building the bridge was under the delegated power of the state, and was called for by the convenience of the public.

The court, after considering to some extent the relations of the state and federal governments, allude to the case of *Wilson* v. *The Blackbird Creek Marsh Co.*, *supra*, as the case most in point, and cite the passages heretofore cited from that case. The court then proceed to say:

"This opinion came from the same 'expounder of the constitution' who delivered the earlier and more elaborate judgment in *Gibbons* v. *Ogden*. We are not aware that the soundness of the principle upon which the court proceeded has been questioned in any later case. We can see no difference in principle between that case and the one before us. Both streams are affluents of the same larger river. Each is entirely within the state which authorized the obstruction. The dis-

similarities are in facts which do not affect the legal question. Blackbird creek is the less important water, but it had been navigable, and the obstruction was complete. If the Schuylkill is larger and its commerce greater, on the other hand the obstruction will be only partial, and the public conveyance to be promoted is more imperative. In neither case is a law of congress, forbidding the obstruction, an element to be considered. The point that the vessel was enrolled and licensed for the coasting trade was relied upon in that case by the counsel for the defendant. The court was silent upon this subject. A distinct denial of its materiality would not have been more significant. It seems to have been deemed of too little consequence to require notice. Without overruling the authority of that adjudication we cannot, by our judgment, annul the law of Pennsylvania.

"It must not be forgotten that bridges which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs.

"It is for the *municipal power* to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise them, subject, however, in all cases, to the paramount authority of congress, whenever the power of the state shall be exerted within the sphere of the commercial power which belongs to the nation. The state may exercise concurrent or independent power in all cases but three.

"1. Where the power is lodged in the federal constitution.

"2. Where it is given to the United States and prohibited to the states.

"3. Where, from the nature and subjects of the power it must necessarily be exercised by the national government exclusively."

(*Houston* v. *Moore*, 5 Wheat, 49; Federalist No. 32.)

"The power here in question does not, in our judgment, fall within either of these exceptions.

"It is no objection to distinct substantive powers that they may be exercised upon the same subject. It is not possible to fix definitely their respective boundaries. 'In some instances their action becomes blended; in some the action of the state limits or displaces the action

of the nation. In others the action of the state is void, because it seeks to reach objects beyond the limits of state authority."

"A state law requiring an importer to pay for, and take out a license, before he could be permitted to sell a bale of imported goods, is void (*Brown* v. *Maryland*, 12 Wheat, 419), and a state law, which requires a master of a vessel, engaged in foreign commerce, to pay a certain sum to a state officer on account of each passenger brought from a foreign country into the state, is also void."

(*Passengers' cases*, 7 How., 273.)

"But a state, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another state, to be sold by retail, or to be sold at all, without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper."

(*License cases*, 5 How., 504.)

"Under quarantine laws, a vessel registered or enrolled, may be stopped before entering her port of destination, or removed and detained elsewhere, for an indefinite period; and a bale of goods, upon which the duties have, or not, been paid, laden with infection, may be seized under 'health laws,' and if it cannot be purged of its poison, may be committed to the flames."

"The inconsistency between the powers of the state and the nation, as thus exhibited, is quite as great as in the case before us; but it does not necessarily involve collision or any other evil. None has hitherto been found to ensue. The public good is the end and aim of both."

"If it be objected that the conclusion we have reached will arm the states with authority potent for evil, and liable to be abused, there are several answers worthy of consideration. The possible abuse of any power is no proof that it does not exist. Many abuses may arise in the legislation of the states which are wholly beyond the reach of the government of the nation. The safeguard and remedy are to be found in the virtue and intelligence of the people. They can make and unmake constitutions and laws; and from that tribunal there is no appeal. If a state exercises unwisely the power here in question, the evil consequences will fall chiefly upon her own citizens. They have more at stake than the citizens of any other state. Hence, there is as little danger of the abuse of this power as of any other reserved to the states. Whenever it shall be exercised openly, or covertly, for a purpose in conflict with the constitution or laws of the United States, it will be within the power, and it will be the duty of this court to interpose

with a vigor adequate to the correction of the evil. * * * * * * * * * * The defendants are proceeding in no wanton or aggressive spirit. The authority on which they rely was given, and afterwards deliberately renewed by the state. The case stands before us as if the parties were the State of Pennsylvania and the United States. *The river being wholly within her limits, we cannot say that the state has exceeded the bounds of her authority. Until the dormant power of the constitution is awakened, and made effective by appropriate legislation, the reserved power of the states is plenary, and its exercise in good faith cannot be made the subject of review by this court.* It is not denied that the defendants are justified if the law is valid. We find nothing in the record which would warrant us in disturbing the decree of the Circuit court, which is therefore affirmed with costs."

Gilman v. *City of Philadelphia*, 3 Wall., 713.

The principles declared in the preceding case are final and conclusive as to the matter in hand, and gain additional strength in their application to the Chicago river. For if the State of Pennsylvania, by *its* delegated power, could authorize the partial blockade of a navigable tide water stream, open to and used by the commerce of other states and nations, it hardly needs parity of reasoning to assert, that the State of Illinois, acting through its delegated authority to the city of Chicago, may do the like as to the Chicago river. Both streams lie entirely within the limits of the respective states; both are navigable waters of the United States. In neither case has congress acted upon this question, or by any legislation restricted, or attempted to restrict, the power of the state in the premises.

In the case of "*The Passaic Bridges*," from MS. of 3 Wall., Jr. (to be found at page 782 of 3 Wall.), the same question was before Mr. Justice Grier, as circuit judge, in regard to a bridge over the Passaic river, and was decided in exactly the same way.

Has, then, the State of Illinois any less control over its rivers than have the other states of the Union?

In the face of the act of congress, approved December 3, 1818, "That the State of Illinois shall be one, and is "hereby declared to be one of the United States of "America, and admitted into the Union *on an equal foot-* "*ing with the original states in all respects whatever*," the inquiry seems superfluous.

Appellant has advanced the argument that the rights of the State of Illinois, and of the city of Chicago under the state, have been curtailed by certain federal legislation.

1. It is contended that the state's control of the Chicago river has been divested by vritue of the territorial ordinances, relating to Illinois, before its admission into the Union as a state. Especial reliance is placed upon article 4 of the ordinance of 1787, for the government of the Northwest Territory, which reads as follows:

"The navigable waters leading into the Mississippi, the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, *i. e.*, without any tax, impost or duty therefor."

As was remarked by BREESE, C. J., in *Ill. Packet Co.* v. *Peoria Bridge Co.*, 38 Ill., 469, it is manifest that this ordinance, even if binding upon the states carved out of the Northwestern territory, does no more than prohibit the levy of *tax*, *impost* or *duty* upon the traffic of the waters referred to. Its reference to navigable waters manifestly refers to those navigable *de facto*, for of those navigable *de jure* there were none. At that time the Chicago river was navigable neither *de facto* nor *de jure*. A passing notice may also be made to the quaint protection afforded *carrying* places. The great divide now fur-

rowed with canals and crossed with railways, has little to remind one of the protection needed to the pathway of the fur trader, as he wearily carried his boat from the Aux Plains to the Chicago.

But all discussion of the effect of the ordinance of 1787 has now become unnecessary. The Supreme court of the United States has expressly decided that no part of the ordinance of 1787 remains in force in the states formed out of the territory therein organized; see:

Pollard's Lessees v. *Hagan*, 3 How., 212.
Permoli v. *First Municipality*, 3 How., 589.
Strader v. *Graham*, 10 How., 82.

In *Pollard's Lessees* v. *Hagan*, *supra*, the court said:

"To Alabama belong the navigable waters, and soils under them, subject to the right surrendered by the constitution to the United States, and no compact that might be made between her and the United States could diminish or enlarge these rights."

And the court further said:

"That the states formed under the ordinance of 1787 stand upon precisely the same ground as the original states as to their powers."

The same rule applies of course to the acts of 1789, 1800, 1804, 1809 and 1818, and to any like legislation of congress enacted before the admission of the state. By the admission of the state such legislation became *functus officio*, and the state became a member of the Union, with all the powers of a sovereign state, subject only to those powers delegated to the federal government by the constitution.

Again, the ordinance requiring that the rivers, creeks and waters should be common highways, if in force at all after the admission of the state into the Union, place the fresh water highways on the same level with the waters

navigable at common law. Clearly, they were not thereby placed on a higher plane than were the tidal waters. As we have seen, under the common law, no river was navigable except those subject to the ebb and flow of the tide. So stood the law, when the various ordinances were passed, to the effect that the "fresh water seas" and their tributaries should be common highways and free from taxes. That the fresh water highways were thereby placed on a higher plane as to free and unobstructed navigation, than were the bays and estuaries of the sea coast, cannot reasonably be held. To consider that congress intended thereby to make waters, then not navigable in law, highways, *more* free and *more* unobstructed than were the waters which the law then considered navigable, would seem an unreasonable and forced construction.

By the decision in *Genesee Chief*, *supra*, these fresh waters were placed in the same category with tidal waters and, what is noticeable in the decision, no reference is made to the territorial ordinances, respecting these waters. This would seem to indicate that such ordinances were not regarded as then in force.

By the act of December 3, 1818, admitting Illinois into the Union, "on an equal footing with the original states in "all respects whatever," all prior territorial laws, *in so far as they deprived the new state of a control over its rivers, equal to that possessed by the original states*, became void and of no effect. Illinois was thereby entitled to exercise the same power over its rivers that Delaware could exercise over Blackbird creek, or Pennsylvania over the Schuylkill river.

The decisions in Ohio and Indiana, cited by counsel, are based upon a mistaken view of the application of the ordi-

nance of 1787, and are all rendered obsolete by the decisions of this court cited above. For example, in the last edition of the Ohio reports there may be found a foot note, in the case of *Hogg* v. *Zanesville Canal and M'f'g Co.*, 5 Ohio, 410, cited by counsel, to the effect that the decision has been rendered obsolete by a decision of the United States Supreme court. The Supreme court of Illinois, although in doubt as to the application of the ordinance in its decision in 38 Illinois, afterwards followed the decisions of this court and affirmed the power of the city of Chicago over the Chicago river.

City of Chicago v. *McGinn*, 51 Ill., 266.

But most reliance seems to be placed on the case of *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How., 518.

In that case the State of Pennsylvania exhibited an original bill, to have a bridge across the Ohio river declared a nuisance. It appeared that the Ohio, where bridged, was between the joint jurisdiction and within the borders of the States of Pennsylvania and Virginia, the latter of which states had alone authorized the erection of the bridge in question; that furthermore, the states bordering upon the Ohio river, and which possessed riparian rights over it, had entered into a compact regarding its navigation, to the effect that it should be forever free to the citizens of each state; and that congress had legislated upon the subject to the same effect; the State of Pennsylvania also showed special damage resulting to it, as a state, from the bridge in question. The decision of the court (McLean, J.) holding that Virginia did not have entire authority to empower the erection of the bridge, was placed *directly* upon the preceding grounds, and *because* of them was distinguished from *Wilson* v. *Blackbird Creek Marsh Co.*, *supra*. The

Wheeling Bridge case is referred to and distinguished in *Gilman* v. *Philadelphia*, *supra*.

Certain Wisconsin cases are cited. Without discussing them at length, it is sufficient to say that I am willing that the same rule as to the effect of Federal legislation on the rivers of Wisconsin should be applied to those of Illinois. They stand precisely on the same footing.

If there were any legislation on the part of congress, curtailing the rights of the State of Illinois over its rivers prior to the admission of the state into the Union, certain is it that this legislation would apply as well to the State of Wisconsin.

Prior to the act of May 7, 1800, Wisconsin, with Illinois, was a part of the Northwestern territory, and subject to the ordinance of 1787. It then, with Illinois, became a part of the Indiana territory; both being still subject to the ordinances of the United States for the government of territories. By the act of February 3, 1809, Wisconsin with Illinois, formed the Illinois territory, and continued so until in 1818, Illinois was admitted into the Union. Up to this time they were governed by and subject to precisely the same legislation on the part of congress. Wisconsin was not admitted as a state until May 29, 1848, and was for thirty years longer than Illinois, subject to the territorial government of the United States. Further than this, the state constitution in Wisconsin provides that the Mississippi and the navigable waters leading into it shall be *public highways and forever free.*

Rev. Stat. of 1878, Art. IX, Sec. 1 of Constitution.

The statutes of that state further declare all rivers and streams of water that have been meandered and returned

as navigable by the United States surveyor, to be navigable.

Rev. Stat. of 1878, p. 477.

Moreover, the Supreme court of Wisconsin appears to hold, in the cases cited by counsel, that the Wisconsin legislature had no power to authorize the obstruction of a navigable public stream lying within the state lines; while the Supreme court of Illinois held the direct contrary in *Chicago* v. *McGinn*, *supra*.

It is clear, therefore, that the power of the State of Illinois over its rivers, as affected by national legislation prior to its admission as a state, is as great as that of the State of Wisconsin. Yet this court is on record as affirming the complete control of the State of Wisconsin over a river emptying into the Mississippi.

In *Pound* v. *Turck*, 5 Otto, 459 (1877), Mr. Justice MILLER, delivering the opinion of the court, says:

"The Chippewa river is a small stream lying wholly "within the State of Wisconsin, but emptying its waters "into the Mississippi. * * * We may concede that "the stream, though small, is a navigable river of the "United States, and protected by all the acts of con- "gress and provisions of the constitution applicable to "such waters.

"The principle established by the decisions * * is "that, in regard to the powers conferred by the commerce "clause of the constitution, there are some which by their "essential nature are exclusive in congress, and which "the states can exercise under no circumstances; while "there are others, which from their nature may be exer- "cised by the states until congress shall see proper to "cover the same ground by such legislation as that body

"my deem appropriate to the subject. Of this class are "pilotage and other port regulations, *Cooley* v. *Board of* "*Wardens*, 12 How., 299; bridges across navigable "streams, *Gilman* v. *Philadelphia;* and, as specially ap- "plicable to the case before us, to erect dams across navi- "gable streams, *Wilson* v. *Blackbird Creek Marsh Co.*, "2 Pet., 245. This general doctrine was very fully "examined and sustained in *Gilman* v. *Philadelphia*, 3 "Wall., 713, and again in *Crandall* v. *State of Nevada*, "6 *id.*, 35."

After discussing the *Blackbird Creek* and *Gilman* cases, the learned justice adds:

"The present case falls directly within the principle "established by these cases, and aptly illustrates its wis- "dom. * * * To the legislature of the state may be "most appropriately confided the authority to authorize "these structures where their use will do more good than "harm, and to impose such regulations and limitations "in their construction and use as will best reconcile "and accommodate the interest of all concerned in the "matter."

Following the decision in *Pound* v. *Turck*, the same rule was adopted in the *Beef Slough* cases in Wisconsin. The first of these cases was *Heerman* v. *Beef Slough, &c., Co.*, 8 Biss., 334, decided in 1878 by Justice Harlan and Judges Bunn and Drummond. There it was held that the state might authorize the Chippewa river to be obstructed, and that, notwithstanding the river was a public highway, it was the province of the legislature to determine whether the benefit from the obstruction would not more than counterbalance the hindrance to navigation.

The second case is *United States* v. *Beef Slough, &c., Co.*, 8 Biss., 421, decided in 1879 by Judges Drummond and Bunn.

This was a bill in chancery brought in the name of the *United States*, to abate the works of the Beef Slough Company, on the Chippewa river. It will be noticed that it was sought in that case to sustain the bill on the ground that the works complained of would interfere with what had been done by congress in improving the river. The court held, however, that the acts of the defendant would not necessarily interfere with the government improvements. The bill was dismissed on demurrer, notwithstanding the admitted fact that the acts of defendant were a material obstruction to the navigation of the river, on the ground that such acts were authorized by the State of Wisconsin.

2. It is claimed that the appropriation of money by congress for the improvement of the Chicago harbor is such legislation by congress as to divest the state of the control over the river.

In the first place, it appears from the testimony that no money has been spent by the Federal authorities upon the river above what is known as Rush street bridge.[1] This bridge is the first city bridge met with on entering the river. So that the closing of this bridge and of all bridges above it could in no way interfere with the work done by the government below that point. As a matter of fact, it appears from the testimony that the money appropriated by congress has been expended, almost exclusively, upon what is known as the outer harbor, a portion of Lake Michigan, near the river's mouth, dredged out and surrounded by breakwaters.[2]

[1] Transcript, 31, 42.
[2] Transcript, 43, U. S. Engineers' reports in evidence.

It will be seen from the testimony, and the reports and maps of the United States engineers, that this outer harbor, upon which the Federal government has expended so much money, is designed to "relieve the Chicago river "by providing an area within which docks and slips "might be constructed for commercial purposes, and inci- "dentally, refuge for vessels." This is what is known to the government as "Chicago Harbor," and is jealously guarded by the War Department from all encroachments. It is distinctly separate from the river proper, which the United States has at no time assumed in any manner to control.

Some stress is laid on the claim, that there was once a light-house above the point where Rush street bridge now stands. This is the only case that is pointed out, or that can be shown, where the United States has ever expended money in or about the river above the lowest of the city bridges. Excepting this one instance, there has been no money expended by the government within that territory which is affected by the bridge ordinances. And it is difficult to see how the erection of a light-house at that point cuts any figure in this case. In the first place, there was then no bridge at Rush street, a ferry being used for crossing. Again, that site has been abandoned for a light-house. The government light-house stands below all the bridges,[1] and the government has not now a dollar's worth of interest, which is represented by improvements, in the river above Rush street bridge.

But the mere expenditure of money on a river within a state by the central government does not divest the state of its inherent rights over that river. Nor are the state laws

[1] Transcript, 43.

void by reason of any mere *inconsistency* with the Federal laws.

Gilman v. *Philadelphia*, *supra*.

To render the state law void, congress must have enacted such statutes as to indicate an exclusive taking possession by the federal power, under its commerce jurisdiction, of that branch of the subject matter which is intended to be covered by the state law. The federal power collects duties on goods, and they then are entitled to enter a port, but the state may intervene under its quarantine laws, seize these goods, retain them indefinitely, or destroy them. Again, the United States has a collector and inspector at this port; this does not prevent the city from employing a harbor master, exercising powers in the same jurisdiction.

Federal legislation, to render unconstitutional the bridge ordinance, must be either a statute expressly prohibiting the erection or closing of bridges, or else a statute regulating the manner of erection and the time of closing. An act of congress regulating the location of wharfs in the Chicago river would not render void an ordinance regarding the price of towage in the same river. An act of congress which required that a certain class of vessels should be allowed to enter the port of Chicago free of duty, would in no wise prevent the local powers from providing proper means to enable traffic to cross the river.

Judge STORY lays it down as a principle, that in order to consider a state law as void because conflicting with a statute of the United States, it must not only affect the subject matter, have some influence over it, but must be directly incompatible or repugnant.

1 Story Com. on Con., § 447.

The acts of this municipality are incompatible and repugnant to no United States statute. On the contrary, the local and federal governments have always acted in harmony regarding the Chicago river and harbor; both aiming to effect, under all the circumstances of the case, the greatest good to the greatest number. If the acts of the city were an interference with the acts of the government in making improvements, it is for the federal power to file a bill for an injunction, as was done in *United States* v. *Beef Slough Co.*, *supra*, and in *U. S.* v. *Duluth*, cited by counsel. The Escanaba and Lake Michigan Transportation Company is not the United States government, nor is it even a subordinate branch of that power, and the court will not, at its instance, redress a grievance of which the federal power alone can complain.

The case of *Wisconsin* v. *Duluth*, cited by counsel, was where the State of Wisconsin undertook to enjoin the city of Duluth from maintaining or permitting a certain canal from Lake Superior into St. Louis Bay, and to compel the city to fill up and destroy the same. It appeared that the canal was built by and was maintained under the entire charge of the United States government.

The court say: "The war department had accepted "the charge of the work, had expended the appropria- "tions made, and had now for several years made the "same regular estimates for this work that it did for all "others under its control and management."

It was therefore held that the court would not compel the city to fill up the canal. Assuming that the war department had taken control of the improvement of the Chicago river, which it has not, yet there is no question here of the city's filling up the river. There has

been no complaint by the federal authorities of any interference with their acts on the part of the city. A case parallel to the Duluth case would be a bill filed by the State of Wisconsin against the city of Chicago, to compel it to close up or destroy the outer harbor, a work created by the United States and now under the charge of the war department.

Very different is the case at bar. The United States has never undertaken to control or manage in any way the Chicago river. Even had it created the river, as it did the canal in the Duluth case, it would still be in the power of the city to provide by proper ordinance for the rights of travel across that river.

To remove all shadow of a doubt, I will call the attention of the court to a decision of this court, where the very question here presented was decided with reference to the Chicago river.

Transportation Co. v. *Chicago*, 9 Otto, 635.

The right of the Transportation Company to recover of the city of Chicago damages for obstructions placed by it in the Chicago river was one of the questions involved. The court say:

"It is contended that neither the state nor the city had "any right to obstruct passage on the river at all. Yet "the river is a highway, a state highway as well as a "national. It has long been held that navigable rivers "wholly within a state are not outside of state jurisdic- "tion so long as congress does not interfere. An abridg- "ment of the rights of those who have been accustomed "to use them, unless it comes in conflict with the consti- "tution or a law of the United States, is an affair between "the government of the state and its citizens, of which

"this court can take no cognizance. *Wilson* v. *The* "*Blackbird Creek Marsh Co.*, 2 Pet., 250."

If any implication may be drawn from these words, it is that congress has neither interfered with nor abridged the rights of the state of Illinois, or of the city of Chicago, over the Chicago river.

It being clear that the State of Illinois has the power to authorize the obstruction of the Chicago river, that authority has been given to the city of Chicago.

Under the old charter, the city of Chicago was given the power:

"Exclusively to erect and construct, or permit or cause "or procure to be erected and constructed, float, pivot or "draw bridges over the navigable waters within the juris- "diction of said city, and keep the same in repair; said "bridges to have draws of suitable width."

By the new city act of 1872, adopted by the city April 23, 1875, it was given the power:

"To construct and keep in repair bridges, viaducts and "tunnels, and to regulate the use thereof."

Also:

"To deepen, widen, dock, cover, wall, alter or change "the channel of water courses."

The power to build bridges, it will be seen, is ample.

By the act of 1872, the city is given the further power:

"To make regulations in regard to the use of harbors, "towing of vessels, opening and passing the bridges."

The municipal code containing the bridge ordinances, went in force in 1881, and the passage of the "ten minute" and "hour" ordinances was clearly within the power delegated to the city of Chicago by the State of Illinois.

II.

ASIDE FROM THE CITY'S CONTROL OVER THIS RIVER, THE BRIDGES ARE NEITHER WHEN OPEN, NOR WHEN CLOSED, UNDER THE ORDINANCES, SUCH NUISANCES AS A COURT OF CHANCERY WILL ABATE.

As the bridges have been built and the ordinances have been passed under statutory authority from the State of Illinois, that fact is a sufficient answer to complainant's bill. It is unnecessary for this court to inquire any further into this case if the court are of the opinion, as were the learned judges who heard the cause below, that the statutes of Illinois, in this regard, are not unconstitutional. For the power to regulate the correlative rights of commerce in and commerce across the Chicago river must rest in some legislative body. If the congress has not taken jurisdiction of this branch of the subject, then the power remains in the state and the state has given it to the city council of the city of Chicago. Its exercise in good faith, then, as was said in *Gilman* v. *Philadelphia*, "cannot be made the subject of review by this court."

That I have gone further in this case is due to no doubt on my part of the sufficiency of the defense in this case; that all the acts complained of were authorized by the State of Illinois. But this court is asked, by its decree, to wipe out rules and regulations essential to the comfort, the happiness and the financial well-being of hundreds of thousands of people. It has, therefore, been my duty to leave nothing undone which could avert such a calamity.

Assuming, then, that the statutes of Illinois, granting to the city these powers, are void and of no effect, and

that the State of Illinois and its agent, the city of Chicago, have no jurisdiction over the Chicago river, yet this bill must be dismissed. Complainant alleges, *first*, that certain bridges with their protections, from Harrison street, south, obstruct the natural channel of the south branch; and, *second*, that the closing of the bridges under the ordinances is a material obstruction to the right of navigation.

The law, as applicable to the first ground of complaint, is well stated in *Mississippi and Missouri Railroad Company* v. *Ward*, 2 Black, 485. That was a bill in chancery, asking for the removal as a nuisance of the bridge at Rock Island, over the Mississippi, a river in the control of no one state.

The court there say:

"Is the bridge west of the Illinois boundary an *unreas-*
"*onable* obstruction, and therefore a nuisance, that a court
"of chancery can lawfully remove? In considering this
"question we must be governed by the same rule on
"which a court of law could proceed in case of an indict-
"ment against the bridge company for committing the
"nuisance; *and the rule is that if the abridgment of the*
"*right of passage occasioned by the erection, was for a pub-*
"*lic purpose and produced a public benefit, and if the erec-*
"*tion was in a reasonable situation, and a reasonable space*
"*was left for the passage of vessels on the river, then it is*
"*not an unreasonable obstruction, and indictable.* (*Rex* v.
"*Russell*, 6 Barn. & Cresw., 566; 13 How., 623; 15 Wen-
"dell, 133.) Then, again, the obstruction to navigation
"must be PLAINLY a nuisance within this rule before it
"can be removed by decree."

The bill here alleges that the bridges are at the street

crossings, and they are evidently for a public purpose, and produce a public benefit.

Inasmuch, therefore, as the bill further alleges that the large steamers owned by complainant do, as a matter of fact, pass all these bridges at each trip, complainant has itself shown that they are not, when open, nuisances.

But what are the facts of the case? *First. Do the bridges, with their protections, from Harrison street south, unreasonably obstruct, when open, the channel provided by nature?* Assuming that the State of Illinois and its agent, the city of Chicago, have no more authority over the Chicago river than individuals would have over the Mississippi river—the question, then, is whether these bridges are an unreasonable obstruction of the *natural channel* of the river. It appears from the maps and the testimony that the south fork of the south branch was naturally a slough, and not navigable. That the south branch was a sluggish tributary to the main river; that it was some ten to twelve feet deep in its deepest parts, and was not much over 100 feet wide at the greatest. Its banks were sloping and covered with verdure. In order to get a ten foot channel it was necessary to go from twenty-five to forty feet from each shore, so that the natural channel in the south branch was not to exceed fifty feet in width.[1]

To show the exact width of the south branch in its natural condition, defendant introduced in evidence a map, made in 1821, drawn to a scale and marked, Defendant's Exhibit No. 1, which has been certified to this court. To ascertain the width of the channel at any given point, it is necessary to deduct from the width, as shown by the map, at least fifty feet.[2] For, like all sluggish streams, the

[1] Transcript, 59, 60.
[2] Transcript, 60.

river had banks gradually sloping at an angle of forty or forty-five degrees.[1] Hence the channel was from twenty-five to forty feet from the bank on each side.[2] On this map there is marked the distance from bank to bank at each point where now stand the bridge piers complained of in the bill; making due allowance for the slope of the banks, it will be seen that the width of the channel at such point, when the south branch was in its natural state, did not exceed fifty or sixty feet.

In widening and deepening this channel the United States government has expended not one cent. The city of Chicago has laid out hundreds of thousands of dollars in dredging, in docking, in condemning land, and in bringing the channel of the river to its present condition.[3] Further than this, the citizens owning land along the banks have, under the direction of the city, expended many thousands more for the same purpose.[4] The result is shown by the map of the present condition of the south branch. This map, Defendant's Exhibit No. 2, is drawn to the same scale as Exhibit No. 1, and the court can ascertain there from the exact width of the present south branch. It will be seen that we have now from Harrison street south, a river from 150 to 250 feet wide, and it is *all channel.* The dredging has given an even depth of from twelve to sixteen feet from dock to dock.

It further appears from the evidence that the narrowest width of the channel and the number of channels at the various bridges complained of in the bill of complaint is as follows:[5]

[1] Transcript, 40.
[2] Transcript, 59.
[3] Transcript, 60, 61.
[4] Transcript, 59.
[5] Transcript, 61, 62.

Harrison street (two channels)..... 66 feet;
Polk street (two channels)..... 52½ feet;
Twelfth street (two channels)..... 70 feet;
Eighteenth street (one channel)..... 65 feet;
Twenty-second street (one channel).. 56 feet;
Halsted street (two channels)..... 46 feet;
Main street (two channels)..... 46 feet;
Fuller street (one channel)..... 50 feet;
Archer avenue (two channels)..... 58 feet;
Douglas avenue (two channels)..... 58 feet;
Ashland avenue (one channel)..... 52½ feet.

And yet, it is complained, that "the said river * * "is divided into two narrow channels considerably less in "width than was one-half (½) of the original or natural "channel thereof," by reason of the bridges with their protections. How far this is from the truth, can be seen at a glance. Not only is each of these "narrow channels" between the bridge pier and the abutments wider than was one-half of the original or natural channel, but each of them is as wide or wider than was the entire natural channel. Complainant does not base its claim on the ground that the present or artificial channel is obstructed. Nor can it be held as regards this complainant, that any bridge is a nuisance which does not materially and unreasonably obstruct the *natural* or *original* channel. The Escanaba & Lake Michigan Transportation Company cannot complain that the city has partially obstructed the river where the city has left a channel two, three and four times as wide as was the natural channel. The city has practically made the river. Under any view of the power of the state over a river entirely within its borders, the city of Chicago may place therein any obstruction it

please, so long as it does not unreasonably and materially obstruct the natural channel.

It appears that the boats of the complainant draw, when loaded, from thirteen to fifteen feet of water. They could not, in 1834, have navigated the whole of the main river, which naturally averaged only ten to twelve feet in depth; much less the south branch and the south fork of the south branch. Does it lie with it to complain of the city of Chicago, which has made the river and branch navigable for its steamers?

It affirmatively appears from the evidence that the bridges over the Chicago river are the best to be had for the situation; that they are most easily and quickly handled, and cause the least possible obstruction to navigation. The centre piers are necessarily longer and wider than the bridges on which they rest, in order to protect them from injury by vessels colliding with them. The bridges are very narrow—the piers being only thirty-four feet wide—in order that navigation may be impeded no more than necessary. One witness testifies that it has always been the policy of the city to so build the bridges that they should interfere as little as possible with navigation.[1]

Complainant's bill admits that the channels "on each "side of the respective piers upon which the said bridges "are supported, which are known as Rush street, State "street, Clark street, Wells street, * * Lake street, "Randolph street and Madison street bridges, * * "are of sufficient width to permit vessels to pass and re-"pass without material obstruction or delay," and complains solely of the bridges from Harrison street south. These have been affirmatively shown to cause no obstruc-

[1] Transcript, 61, 62.

tion whatever to the natural channel, and the claim that any bridge, when open, is a nuisance, is shown to be wholly and entirely without foundation.

It is claimed that there are certain vessels of the Goodrich Company which cannot pass through the draws. But it appears that these are old-fashioned, side-wheel steamers, whose dock is below the lowest city bridge.[1]

That none of these vessels could pass the draws at Madison or Randolph street bridges, and hence could not get as far south as Harrison street bridge.[2] Yet complainant admits in its bill, that the draws at Madison and at Randolph street bridges "are of sufficient width to "permit vessels to pass and repass without material obstruction or delay." But, in any event, how can this corporation complain that the vessels of another corporation are obstructed?

As to the complaint that appellant is obliged to employ tugs in order to pass the narrow draws of the city bridges, it is not shown why it would not require towing in order to pass the equally narrow draws of the railroad bridges, were all the city bridges removed.

The complaint is made for the first time in this court regarding the Illinois Central Railroad bridge. It will be noticed that the bill makes no allegation regarding this bridge, but, on the contrary, the draws of the bridges over the main river are admitted to be of ample width, and the complaint is confined to the bridges from Harrison street south. The railroad company is not a party to this suit, nor is there any connection shown between it and the city. Whether the railroad company was or

[1] Transcript, 29, 30.
[2] Transcript, 29.

was not authorized by the city to build this bridge does not appear.

As to the draws at Harrison street bridge, of which appellant especially complains, it appears from the evidence that the channel, at this point, was originally fifty feet wide.[1] The pier on which the bridge rests was originally about two-thirds across the river. Since then, the city, at an expense of over $20,000, condemned seventy-two feet on the west side of the river, and widened the river that width. The effect of this was to give the navigation interests two channels, each sixty-six feet wide, where before, in the natural condition of the river, it had but one channel and that only fifty feet wide.[2]

Complaint is also made that the channel is obstructed at various bridges by reason of vessels lying at the docks opposite the bridge piers. If vessel owners obstruct the river in this manner, without authority of law, let them be prosecuted. But the city is in no wise responsible for the acts of the vessel men in blockading the channel with their boats. The bridges, with their piers, are not an unreasonable obstruction of the channel; if they were, still they are obstructions authorized by the state. But the vessels, lying at the docks opposite these piers, have no authority from the legislature to obstruct navigation. If, then, they are unreasonable obstructions, they are nuisances, and should be abated in a proper proceeding. And this is true, whether the nuisance be caused by the boats of appellant, or of any other vessel owner.

Second. Are the bridge ordinances unreasonable, and does their enforcement, under all the circumstances of the

[1] Transcript, 60.
[2] Transcript, 59, 60, 61.

case, unreasonably obstruct the navigati n of the river?

This discussion is material, under the authorities, only on the assumption that the State of Illinois has no power over a river within its lines. For if it has, then it has deputed its power over the Chicago river to the city, and all the acts complained of in this suit have been done under that deputed power.

Assuming, then, that the city of Chicago has no right to erect and regulate bridges by virtue of its charter from the State of Illinois, is the closing of the bridges for the time specified in the ordinance, under all the circumstances, an unreasonable obstruction of the right of navigation?

As has been well said by Justice GRIER in *Devoe* v. *The Penrose Ferry Bridge Company*, 3 Am. Law Reg., 83:

"When bridges are constructed with draws, or open-
"ings for the passage of masted vessels, and high enough
"to permit others to pass under, the occasional delay of
"such vessels for a short time may be a trifling incon-
"venience in comparison with the public benefit of the
"bridge. *In every investigation of this kind the question*
"*is relative, not absolute.* Whether a certain erection be
"a nuisance must depend upon the peculiar circumstances
"of each case. When the trade of the channel is of
"great amount and importance, and that across it trifling,
"the same rule cannot apply as to a case where the con-
"ditions are contrary."

To the same effect are:

Illinois River Packet Co. v. *Peoria Bridge Ass'n*, 38 Ill., 467.
City of Chicago v. *McGinn*, 51 Ill., 266.
Williams v. *Beardsley*, 2 Carter (Ind.), 591.

The rights, therefore, of the people to navigate a stream and the rights of the people living on its banks to cross the same are correlative and reciprocal. This is true in the absence of any statutory power to build and regulate bridges. Each and every citizen of Chicago is entitled to cross the river without unreasonable detention by vessels. Each individual, be he laborer or merchant, is as much entitled to the protection of this court in the enjoyment of this right, as is this Michigan corporation in the enjoyment of its alleged right to navigate the stream without unreasonable delay from those using the bridges.

The question then is, is the bridge ordinance an equitable adjustment of these correlative rights, assuming a want of power in the state to control the river?

The material parts of the ordinance are as follows:

§ 984. Between the hours of six and seven o'clock in the morning and half-past five and half-past six o'clock in the evening, Sundays excepted, it shall be unlawful to open any bridge within the city of Chicago.

§ 985. During the hours between seven o'clock in the morning and half-past five o'clock in the evening, it shall be unlawful to keep open any bridge within the city of Chicago for the purpose of permitting vessels or other craft to pass through the same, for a longer period at any one time than ten minutes, at the expiration of which period it shall be the duty of the bridge tender or other person in charge of the bridge to display the proper signal and immediately close the same, and keep it closed for fully ten minutes for such persons, teams or vehicles as may be in waiting to pass over, if so much time shall be required, when the said bridge shall again be opened (if necessary for vessels to pass) for a like period, and so on alternately (if necessary) during the hours last aforesaid; and in every instance when any such bridge shall

be opened for the passage of any vessel, vessels, or other craft, and closed before the expiration of ten minutes from the time of opening, said bridge shall then, in every such case, remain closed for fully ten minutes, if necessary, in order to allow all persons, teams and vehicles in waiting to pass over said bridge.

§ 986. Bridge tenders or persons in charge of the bridges shall not close the same against vessels seeking to pass through, until passengers, teams or vehicles have been delayed fully ten minutes by the bridges being open.

It will be noticed that the hour closing applies only to week days, and that there is no ordinance applying to the hours between 6:30 P. M. and 6 A. M. During those hours the vessels have the exclusive right of way.

That a due appreciation may be had of the peculiarity of the situation of the city of Chicago, with reference to the river, defendant introduced in evidence a map of the city and harbor, made by United States engineers, which has been certified to this court as Defendant's Exhibit No. 3. From this it will be seen that the city is in the form of a semi-circle, having its center at the mouth of the Chicago river and fronting on Lake Michigan. This semi-circle is divided into three divisions or sides by the river and its north and south branches. The business portion of the city, where the wholesale stores, the offices, the courts and the principal public buildings are located, is the south division. Those who do business there reside on the north and west sides and in the suburban towns. The majority reside on the west side, which contains more than double the population of the other two divisions.

Dividing the city into three sections, the river is crossed by every one of the main arteries of traffic. Although the street crossings have been raised much above the ordinary level, that level is so low that the height of the bridges is not sufficient to permit the unobstructed pas-

sage of other vessels than tugs, mastless barges or lighters, and canal boats. Therefore, it has been necessary to adopt swinging bridges resting on a central pier, which have to be opened whenever a trading or passenger vessel is to pass up or down the harbor.

The railroad depots are located in different portions of the city, and merchandise is transported in consequence from one division of the city to the other across the bridges. According to the United States census of 1880, Chicago is the third manufacturing city in size in the country. It has long been the great railroad center of the country. A faint idea may be thus obtained as to the amount of traffic which must necessarily cross the bridges in vehicles and railroad cars.

The population of Chicago is now not far from six hundred thousand (600,000). The bulk of this population are compelled to cross and re-cross the river daily, going to and from their homes and places of business. More than this, there are thousands doing business here, who are brought to the city by suburban trains and landing on the north or west sides, are compelled to cross the bridges.

The result of all this is that the bridges, more particularly over the main river and the south branch, are crowded from early morning until late at night. They are but twenty-five or thirty feet in width, so as to interfere with the channel as little as possible, and will accommodate but one line of teams each way. A slight stoppage or delay causes a line of vehicles blocks in length. Teams will then be delayed on the cross streets and a jam results. Scarce ten minutes will pass at any of the principal bridges during the day that there is not some jam or crowd ne-

cessitating the intervention of the police. When a bridge is opened for the passage of a vessel the trouble is increased ten fold. At such times traffic at the place where transit is thus cut off is wholly interrupted, and the spectacle is afforded of a street blocked up on each s de of the river for several squares with street cars, vehicles of all descriptions, and thousands of pedestrians. Not only is every team delayed, but as but one line can cross in each direction, and as the crossing must necessarily be made at a walk over the light and easily handled bridges, every team in the long line must walk from the point where it has been caught until the bridge is passed. The same is true of the street cars. Every passenger is delayed, not only while the bridge is opened, but also by the delay from the car proceeding at the pace of the slowest team in the long line. This is by no means an occasional occurrence. On the contrary, it occurs dozens of times every day, at every bridge during the entire season of navigation. Visitors to the city rarely fail to express wonder that a place so renowned for its enterprise should be satisfied to endure the continued existence of a state of things that so manifestly involves tremendous loss of time and money.

Efforts have been made by the city to relieve the enormous pressure upon the bridges by the building of a tunnel under the river at LaSalle street, joining the north and south sides, and one at Washington street, joining the south and west sides. The experiment has, however, completely failed. In order not to be too long they have necessarily been made rather steep, and cannot be used by heavy teams. They are damp and dark and there are few who would not prefer the loss and damage by delay at the bridges in preference to descending into the bowels

of the earth and climbing out again. The fact that the present tunnels are not generally used by the public is a sufficient answer to the claim that more structures of the same kind should be erected.

It is hard to appreciate the enormity of the difficulties, the delays, the damage caused by the "bridge nuisance," as it is popularly termed, except by personal observation. We have endeavored, however, by the compilation of statistics, to show in the record the comparison between the interests of the people and those of the ship owners. It is, perhaps, best summed up in the testimony of one of defendant's witnesses. He says:

"The interests of the people in the city are so infinitely "superior in their magnitude and importance to that of the "vessel interest, that there can be no comparison institu-"ted between them at all. We have here a population "approximating from 600,000 to a million, and largely in-"creasing every year, which use these bridges from day "to day in crossing and re-crossing to their homes and "places of business, and the importance of their reaching "their homes and places of business is so great, so im-"mense in its character, that the interest of the vessels on "the river cannot be compared to it in any respect." [1]

Complainant has laid no stress, either in its bill or in the proof upon the "ten minute" ordinance. Nor do I propose to discuss it. It is *res judicata*. In *City of Chicago* v. *McGinn*, 51 Ill., 266, this ordinance was sustained by the Supreme court of Illinois.

It will be observed that at that time the city of Chicago had no express authority from the State of Illinois to regulate the opening and closing of the bridges. The court

[1] Transcript, p. 57.

held that the city had an implied or incidental power to regulate this subject and sustain the ordinance, on the broad grounds that "the right to navigate and the right "to cross" a navigable river "are co-existent."

The court, it is true, affirm the sovereignty of the state over a river within its borders, following the decisions of the United States Supreme court; but the decision is based on the grounds above mentioned.

It is interesting in this connection to consider the language of the Illinois Supreme court regarding the Chicago river, in another case:

"On the borders of this little river, within the memory "and active life of men yet young, now performing their "parts on its busy stage, a city has grown up, *numbering* "*near two hundred thousand people*, who are separated, by "the peculiarities of the river, into three great divisions, "with an equal number of inhabitants, or nearly so, in "each; the river, by its main stem and branches rising "and running in directly opposite directions, capable of "sustaining vessels of great draft of water, affording a "harbor for them of more than fifteen miles in extent, is "spanned in its course to the lake by several bridges, over "which vast crowds of people, and property in vehicles of "every description, horsemen, footmen and carriages, "hourly pass. *Has any one ever supposed the facilities of* "*intercourse and business afforded by these structures should* "*be, of right, subordinated to even the immense com-* "*merce which crowds the channel of this river and* "*whitens, in the season of navigation, its bosom with their* "*canvas?*"

Ill. R. Packet Co. v. *Peoria Bridge Ass'n.*
38 Ill., 467.

Since these decisions were rendered, the city has *trebled* in size.

It is apparent from the testimony and from the nature of things that the closing of the bridges during the hour from six to seven A. M., is no material damage to the vessel interests. No passenger boats leave at such an early hour, and sailing vessels naturally aim to clear in the evening, so as to take advantage of the winds during the night, instead of lying idle at their docks. Practically the only delay is that suffered by the few boats arriving in the early morning.

On the other hand, the morning hour is emphatically the working man's hour. He must begin work at sharp seven. The statistics taken at Wells street bridge show that between six and seven A. M. there crossed from the north to the south side, two thousand, four hundred and fifteen (2,415) pedestrians, out of a total of 10,269 for the thirteen and a-half hours, or more than *three* times the hourly average going south.[1]

That at Randolph street during the same hour there crossed from the west to the south side five hundred and eighty (580) pedestrians out of a total of 4,626 for the thirteen and a-half hours, or about double the hourly average going east.[2]

That over Clark street bridge there were carried to the south from the north side, between 6:30 and 7 A. M., in the street cars alone, fourteen hundred (1,400) passengers, nearly all laboring men.[3]

That there were carried over Madison street bridge from the west to the south side between 6 and 7 A. M.,

[1] Transcript, p. 64.
[2] Transcript, p. 65.
[3] Transcript, p. 67.

in the street cars alone, a total of thirteen hundred and twenty-six (1,326) passengers.[1]

This is merely a sample. During this hour all the bridges over the main river are crowded with workmen going south, and all the bridges over the south branch with those going east. In addition to Clark and Madison streets, numerous lines of street cars are run over five other bridges.

An officer of one of the street railway companies testifies, that prior to the passage of the hour ordinance, many complaints were made to him by laborers of being delayed at the bridges before seven A. M. The men would leave their homes for work before seven o'clock, and being caught at the bridge by some vessel passing through, would reach work after seven. This would compel them to lie off until nine o'clock, and entail the losss to them of a quarter of a day's wages.[2] This they can ill afford, and it is no wonder they complained. The railway company was, however, not to blame. Since the passage of this beneficent ordinance, the laborer has been enabled to reach his work on time, and earn his full day's pay. It would be an interesting matter to calculate the value of the time lost in Chicago by the delay at bridges. It is safe to say that the value of the time lost in one year would exceed the entire cash value of all the vessels which come to this port.

The reasonableness and necessity of the evening hour closing is still more striking.

About 5 P. M. the current sets in from the business center of the city towards the north and west sides. It con-

[1] Transcript, pp. 67, 68.
[2] Transcript, 67.

times until 7 P. M., and is at its height from 5:30 to 6:30 P. M.

Across Wells street bridge there passed from the south to the north side, from 5:30 to 6:30 P. M. three thousand and sixty (3,060) pedestrians, out of a total of 10,500 for the thirteen and a half hours, or *four* times the hourly average of those going north.[1]

Across Randolph street bridge there passed from the south to the west side during the same hour two thousand two hundred and seventy-five (2,275) pedestrians, out of a total of 5,485 for the thirteen and a half hours, or more than *five* times the hourly average of those going west.[2] Over Clark street bridge there were carried during the same hour in the street cars alone, from the south to the north side, two thousand two hundred and seventy-eight (2,278) passengers.[3] Over Madison street bridge, during this hour, there were carried from the south to the west side in the street cars alone, three thousand five hundred and forty-nine (3,549) passengers, an average of sixty a minute.[4] On the other hand, take the number of vessels which passed the bridges on the days these observations were taken. On April 18, 1882, there passed Wells street bridge from 5:30 A. M. to 7 P. M., seventeen steam and twenty-four sail vessels, going in both directions, an average of three vessels an hour. On April 21, 1882, there passed Randolph street bridge during the same time, going in both directions, fifteen steam and sixty sail vessels, an average of five and one-half an hour. On June 1, 1881, there passed Madison street bridge, going in both directions, thirty-two steam and fifty sail vessels, an average

[1] Transcript, 65.
[2] Transcript, 66.
[3] Transcript, 67.
[4] Transcript, 68.

of six an hour. On June 16, 1881, there passed Clark street bridge, going in both directions, twenty-two steam and ninety-two sail vessels, an average of eight an hour.[1] It will be noticed that the great majority of the vessels are sail. These employ from four to twelve men, and the largest steam vessels employ only twenty to twenty-five men, three-fourths of them deck hands.

Consider, then, the course of one of these boats entering or leaving the harbor. Take for example, one of complainant's boats, among the largest freight steamers on the lakes, and employing some twenty or twenty-five men.

Entering the harbor, it must pass all the bridges on the main river, all on the south branch to the south fork, and on the south fork to the docks near Archer avenue. Every bridge, some eighteen or twenty in number, aside from the railroad bridges, must open and remain open, while the boat pursues its slow and, to the landsmen, aggravating course through the draws. At each and every bridge, will be detained pedestrians, loaded teams, omnibuses, vehicles of every kind, and at seven of the bridges, street cars with their loads. Then consider the result if this boat enters the harbor about 5:30 P. M. Aside from loaded teams and railway trains, and vehicles, this vessel with its twenty or twenty-five men would detain in all from 3,000 to 6,000 people, according to its speed.

Is it not fair and just and equitable that the vessel interest, insignificant as it is in comparison, should be made to yield something to the vital interests of this great metropolis?

[1] Transcript, 64-66.

The intimation is made by appellant that the burden is on us to show that the bridge ordinances are reasonable. No authorities are cited, and I will forbear citing any holding the other way. There are some things a court may be presumed to know. One is, that when an ordinance is attacked as unreasonable, it behooves the party attacking it to make a case. Appellant admits that the city has power to build bridges. The power to regulate the time and manner of opening and closing them necessarily follows. The elaborate tables prepared by appellee were, perhaps, superfluous in view of the lack of evidence on behalf of the Transportation Company. But these observations, taken at two or three of the principal bridges, were made to embrace every conceivable feature of the travel in and across the river, in order that the court might, at a glance, perceive the reasonableness of the ordinances regulating such travel. It will be observed that such table embraces land travel only in one direction, but water travel in each direction.

It was not necessary to take observations at more than one of these bridges. For the vessels of appellant, in order to enter or leave the harbor, are obliged to pass all of the bridges on the main river, and all on the south branch. It is not pretended that the ordinances seriously injure appellant by obstructing passage from one point to another within the harbor. And the closing of a single bridge would prevent appellant's boats from entering to or leaving from its docks at Thirty-second street. Hence, if the comparative amount of travel and traffic across one bridge, intervening between these docks and Lake Michigan, justifies the closing of that bridge at certain hours, it is idle to argue whether a certain other bridge, likewise intervening, has

more or less travel. In point of fact, there is not a bridge, railroad, or city, which is not more used for travel and traffic at all times during the day than is the channel of the river.

Counsel devotes considerable space to showing that there is a greater necessity for closing the bridges at hours other than that between six and seven o'clock in the morning. On the other hand, there is shown to be no necessity for keeping them open during that hour, scarcely any vessels entering or leaving so early in the morning. The closing at this hour is for the benefit of the laborers, whose time is money, and who suffer financially from delay at the bridges. But it would be easy to demonstrate, were it necessary in this case, that the comparative rights of travel in and travel across the Chicago river require the closing of the bridges at all hours during the day, thus compelling vessels to enter and leave the harbor at night.

Although appellant has shown in its argument that there is a very great necessity for keeping the bridges closed during hours other than those now included in the ordinances, I will not defend the council for acting in the seeming interest of vessel men. That the city council has not extended the time during which the bridges should be kept closed, is, perhaps, because the vessel interests, as well as those of the people at large, are by it represented. It has always been slow to impede in any way the interests of navigation, however imperative the demands of hindered land traffic.

It does not seem difficult for the vessel men to so arrange matters that they can clear this port either between the hours of 7 A. M. and 5:30 P. M., or the hours of 6:30 P. M. and 6 A. M. They still have twenty-two hours out

of the twenty-four. Those arriving here during the closing hours have ample space in the river and outer harbor in which to wait.

It cannot be expected that vessels can pass through miles of water in the heart of a city of this size with the same ease with which they can enter a small and unimportant harbor. The matter of an hour's time is one of no great importance to a vessel, depending, as it does, on the varying wind and the fickle weather. It is not like the express train, arriving and departing on the minute.

I have not discussed the damage done by delay from vessels to the rail traffic, nor the delay to the United States mail, nearly all of which crosses the river. Railroads running to other states are now as much under the "commerce" jurisdiction of the soverign government as are the vessels, and as much entitled to its protection. But complainant has failed to connect the city with the bridges erected by the roads; nor are these bridges subject to the bridge ordinance.

Under a very recent decision the ordinances here in question may be sustained, on grounds other than a state's control over its own rivers.

Packet Co. v. *Board of Trustees*, decided by this court May 8, 1882, and reported in 105 U. S., 559, was a bill by the Packet Company to enjoin the town of Catlettsburg, Ky., from enforcing its ordinance prescribing where vessels should land. The town is on the Ohio river, and it was contended that the ordinance, although authorized by the State of Kentucky, was invalid, as being a regulation of commerce upon the Ohio river. The court holds that it was, in one sense, a regulation of commerce, but nevertheless valid, because congress has never attempted to make such regulations.

The court say (MILLER, J.):

"The necessity for the existence of this power cannot "be doubted. We are not aware that in any instance "congress has attempted to exercise it. If it be a regu- "lation of commerce, under the power conferred on con- "gress by the constitution, that body has signally failed "to provide any such regulation. It belongs, also, mani- "festly to that class of rules which, like pilotage, and "some others, can be most wisely exercised by local au- "thorities, and in regard to which no general rules appli- "cable alike to all ports and landing places can be prop- "erly made. If a regulation of commerce at all, it comes "within that class in which the states may prescribe rules "until congress assumes to do so. (*Cooley* v. *Board of* "*Wardens*, 12 How., 237; *Gilman* v. *Philadelphia*, "3 Wall., 727; *Crandall* v. *Nevada*, 6 Wall., 42; "*Pound* v. *Turck*, 95 U. S. R., 462.)"

"There is probably not a city or large town in the "United States, situated on a navigable river, where or- "dinances, rules and regulations like those of the town of "Catlettsburg, are not made and imposed by authority "derived from state legislation, and the long acquiescence "in this exercise of the power and its absolute necessity "are arguments almost conclusive in favor of its rightful "existence."

This is said of the Ohio river, the river of the Wheeling Bridge case, a river not lying in any one state, and over which no one state has control. The ordinance is sustained on the broad principle that such regulations are necessary and, until provided for by congress, the local authorities can properly make them.

It requires no argument to show that were the Chicago river, like the Ohio, within the bounds of no single state,

yet the state or the city might properly provide for and regulate the conflicting rights of traffic in the stream and traffic across the stream. Such regulations are of precisely the same character as pilotage laws and wharfage regulations, and, until congress undertakes to pass a bridge ordinance for the city of Chicago, would be sustained, if on no other, on the ground of "long ac- "quiescence" and "absolute necessity."

In conclusion, I submit that there was never a better illustration of the wisdom of the rule as laid down by Chief Justice MARSHALL, in *Wilson* v. *Blackbird Creek Marsh Co.*, and so often reiterated by this court. It would be difficult to imagine a course more just and more fair to the many interests involved than the one pursued by the city of Chicago in its dealings with the Chicago river.

Everything possible has been done to foster the vessel interest, and it has been the policy of the city at all times to interfere with this interest no more than the imperative necessities of the case demanded. There was a time in the early history of the town when its harbor facilities seemed vital to its interests; and even now its connection with the lake system is a material factor in the city's greatness. Self interest alone has, therefore, demanded that this interest should not be damaged, but should be cared for and protected. Hence, the channel of the river has been dredged, docked and widened from year to year at enormous expense.

In providing means for crossing, the little town at first was content with ferries; as it increased in size permanent bridges were demanded. These were built only as fast as they were imperatively and immediately required, and

were designed to interfere with navigation as little as possible.

In 1867, the city had increased its population to 200,000, and it was found necessary to pass a reciprocal "ten minute" ordinance.

Then tunnels were built, but they afforded no relief to the rapidly increasing city.

Finally, the metropolis of 600,000 inhabitants absolutely demanded some relief from the delays at the bridges. No relief could be had, save by closing the bridges during the time of the greatest travel—from 6 to 8 A. M., and from 5 to 7 P. M. Still regarding the interests of navigation, this was cut down to one hour in the morning, and one hour in the evening. Everything else remains as it was when the city was one-third its present size.

Yet the conduct of the city in this regard is described by counsel as "oppressive and arbitrary," and this court is asked to annul the city ordinances, and to declare that this municipality has no right to exercise powers which are essential to its very existence.

As this court has said in *Gilman* v. *Philadelphia*, *Pound* v. *Turck*, and *Packet Co.* v. *Trustees*, it is for the municipal power to weigh the considerations which belong to this subject. That appellee has in all respects exercised this power wisely and well, and thus vindicated the justice of the decisions of this court, has been, I submit, clearly and conclusively shown.

Respectfully submitted.

FREDERICK S. WINSTON, JR.,

For Appellee.

17-678

IN THE

SUPREME COURT of the UNITED STATES.

October Term, A. D. 1882.

No. 1057.

THE ESCANABA AND LAKE MICHIGAN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR APPELLEE

Upon the rights of the State of Illinois over its rivers, as affected by the legislation of Congress.

FREDERICK S. WINSTON, Jr.,
FOR APPELLEE.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

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With the kind permission of the court, appellee desires to file herein its more condensed argument on the point that the rights of the State of Illinois over the Chicago river have not been divested by the territorial ordinances of the United States. It desires to submit this in the place and stead of the more lengthy argument on that point, in its first brief, on pages 7 to 22, which may be considered as withdrawn.

It is not believed that the court will object to this condensation, as it is hoped it will both save the time of the court and render the point more clear.

ARGUMENT.

I.

THE STATE OF ILLINOIS HAS AUTHORIZED THE CITY OF CHICAGO TO DO ALL THE ACTS COMPLAINED OF.

Under the common law, as established by the courts of England, no stream is navigable except where it is subject to the ebb and flow of the tide. The reason of the law is evident. In the British Islands no streams, except in a few isolated cases, are navigable in fact above tide water; and tide water there is a fair criterion of the navigability of water.

The English law on this subject has been adopted by the courts of most of the eastern tide water states, and, with less reason, by those of Mississippi, Michigan and Illinois. The rule was followed by the Supreme court of the United States in

The Thomas Jefferson, 10 Wheat., 428.

In 1851, upon the question of admiralty jurisdiction being presented to this court in *Genesee Chief* v. *Fitzhugh*, 12 How., 443, *The Thomas Jefferson* was modified, and the jurisdiction was held to extend to the great lakes and rivers.

In *Barney* v. *Keokuk*, 4 Otto, 338 (1876), the court say:

"And since this court in the case of *The Genesee Chief*, "12 Id., 443, has declared that the great lakes, and other "navigable waters of the country, above as well as below

"the flow of the tide, are, in the strictest sense, entitled "to the denomination of navigable waters, and amenable "to the admiralty jurisdiction, there seems to be no sound "reason for adhering to the old rule as to the proprietor- "ship of the beds and shores of such waters. It properly "belongs to the states by their inherent sovereignty."

In Illinois, however, the old rule still prevails and the Chicago river, under the decisions of the Supreme court of Illinois, is not, legally, a navigable stream.

Middleton v. *Pritchard*, 3 Scam., 510.
Ensminger v. *People*, 47 Ill., 384.
City of Chicago v. *McGinn*, 51 Ill., 266.

Under the decisions of this court, all streams are considered navigable waters of the United States, which are *de facto* navagable, and which, by their connection with other waters, afford a highway for boats coming from other states.

The Montello, 11 Wall., 411.
The Daniel Ball, *id.*, 557.

Over such waters congress has power, under the commerce clause of the constitution, to exercise jurisdiction. It is not disputed by appellee in this case that congress has the right to exercise its powers over the Chicago river. The contention here is (1) that congress has not, in fact, so far exercised such powers as to deprive the State of Illinois of *any* of its inherent rights over a river lying within its borders; and (2) that certainly the rights of the state, in question in this suit, have not been thus divested.

What, then, are the inherent rights of a state over its rivers?

Passing over the earlier decisions in Massachusetts and New York, the question first arose in this court in 1824, in the case of *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Peters, 245.

It was there held (MARSHALL, C. J.) that the State of Delaware had the right to authorize a navigable arm of the sea, lying within the state lines, to be totally obstructed by a dam. The creek was subject to the ebb and flow of the tide and was a legally navigable water; but, lying within the state, was subject to the powers of the state.

The next case which arose in this court was *Gilman* v. *City of Philadelphia*, 3 Wall., 713, which treats of the whole subject in an elaborate manner, and has, I submit, settled the law as applicable to this case.

The Schuylkill river was a legally navigable stream, subject to the ebb and flow of the tide. By its joinder with the Delaware river, it was open to vessels from other states, and hence, a navigable water over which congress could exercise its powers. It was a stream appropriated for by congress, and a part of the United States collection district of Philadelphia. The city of Philadelphia, under authority from the State of Pennsylvania, proceeded to build a bridge which would, from having no draws, obstruct navigation.

To prevent this, a bill was filed by the owner of dockage above the proposed bridge. The contention was, that the state had no power to authorize the obstruction of a navigable stream over which congress could and did exercise jurisdiction. But this court, after discussing at length the concurrent powers of the state and the nation, held that the state had the power to authorize the obstruction.

The court say:

"It must not be forgotten that bridges which are connecting parts of turnpikes, streets and railroads, are "means of commercial transportation, as well as navigable waters, and that the commerce which passes over a "bridge may be much greater than would ever be transported on the water it obstructs.

"It is for the *municipal power* to weigh the considerations which belong to the subject, and to decide which "shall be preferred, and how far either shall be made "subservient to the other. The states have always exercised this power, and from the nature and objects of the "two systems of government they must always continue "to exercise them, subject, however, in all cases, to the "paramount authority of congress, whenever the power "of the state shall be exerted within the sphere of the "commercial power which belongs to the nation."

In the case of "*The Passaic Bridges*," from MS. of 3 Wall., Jr. (to be found at page 782 of 3 Wall.), the same question was before Mr. Justice Grier, as circuit judge, in regard to a bridge over the Passaic river, and was decided in exactly the same way.

Has, then, the State of Illinois any less control over its rivers than have the other states of the Union?

In the face of the act of congress, approved December 3, 1818, "That the State of Illinois shall be one, and is "hereby declared to be one of the United States of "America, and admitted into the Union *on an equal foot*-"*ing with the original states in all respects whatever*," the inquiry seems superfluous.

Appellant has advanced the argument that the rights of

the State of Illinois, and of the city of Chicago under the state, have been curtailed by certain federal legislation.

1. It is contended that the rights of the state are affected by certain territorial ordinances. But it has been expressly held that such legislation in no way curtails the rights of the new states; that no compact made between the new state and the United States can diminish or enlarge those rights; but that each state, when admitted, stands on the same footing as respects her powers, as do the original states.

Pollard's Lessees v. *Hagan*, 3 How., 212.
Permoli v. *First Municipality*, 3 How., 589.
Strader v. *Graham*, 10 How., 82.

Again, the ordinance requiring that the rivers, creeks and waters should be common highways, if in force at all after the admission of the state into the Union, place the fresh water highways on the same level with the waters navigable at common law. Clearly, they were not thereby placed on a higher plane than were the tidal waters. As we have seen, under the common law, no river was navigable except those subject to the ebb and flow of the tide. So stood the law when the various ordinances were passed, to the effect that the "fresh water seas" and their tributaries should be common highways and free from taxes. That the fresh water highways were thereby placed on a higher plane as to free and unobstructed navigation, than were the bays and estuaries of the sea coast, cannot reasonably be held. To consider that congress intended thereby to make waters, then not navigable in law, highways, *more* free and *more* unobstructed than were the waters which the law then con-

sidered navigable, would seem an unreasonable and forced construction.

By the decision in *Genesee Chief*, *supra*, these fresh waters were placed in the same category with tidal waters, and what is noticeable in the decision, no reference is made to the territorial ordinances respecting these waters. This would seem to indicate that such ordinances were not regarded as then in force.

By the act of December 3, 1818, admitting Illinois into the Union "on an equal footing with the original states "in all respects whatever," all prior territorial laws, *in so far as they deprive the new state of a control over its rivers, equal to that possessed by the original states*, became void and of no effect. Illinois was thereby entitled to exercise the same power over its rivers that Delaware could exercise over Blackbird creek, or Pennsylvania over the Schuylkill river.

The decisions in Ohio and Indiana, cited by counsel, are based upon a mistaken view of the application of the ordinance of 1787, and are all rendered obsolete by the decisions of this court cited above. For example, in the last edition of the Ohio reports there may be found a foot note, in the case of *Hogg* v. *Zanesville Canal amd M'f'g Co.*, 5 Ohio, 410, cited by counsel, to the effect that the decision has been rendered obsolete by a decision of the United States Supreme court. The Supreme court of Illinois, although in doubt as to the application of the ordinance in its decision in 38 Illinois, afterwards followed the decisions of this court and affirmed the power of the city of Chicago over the Chicago river.

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But most reliance seems to be placed on the *Wheel-*

ing Bridge case. There, the obstruction was authorized by but one state, within whose bounds the river did not lie; and congress had so far acted in the matter as to make the erection a violation of federal statutes.

Without considering further the distinctions between this and the case at bar, I would call the attention of the court to *Gilman* v. *Philadelphia*, *supra*, where the case is elaborately discussed and distinguished.

Certain Wisconsin cases are cited. Without discussing them at length, it is sufficient to say that I am willing that the same rule as to the effect of federal legislation on the rivers of Wisconsin should be applied to those of Illinois. They stand precisely on the same footing.

If there were any legislation on the part of congress, curtailing the rights of the State of Illinois over its rivers prior to the admission of the state into the Union, certain is it that this legislation would apply as well to the State of Wisconsin.

Prior to the act of May 7, 1800, Wisconsin, with Illinois, was a part of the Northwestern territory, and subject to the ordinance of 1787. It then, with Illinois, became a part of the Indiana territory; both being still subject to the ordinances of the United States for the government of territories. By the act of February 3, 1809, Wisconsin, with Illinois, formed the Illinois territory, and continued so until, in 1818, Illinois was admitted into the Union. Up to this time they were governed by and subject to precisely the same legislation on the part of congress. Wisconsin was not admitted as a state until May 29, 1848, and was for thirty years longer than Illinois, subject to the territorial government of the United States. Further than this, the state constitution of Wisconsin provides that the

Mississippi and the navigable waters leading into it shall be *public highways and forever free.*

Rev. Stat. of 1878, Art. IX, Sec. 1 of Constitution.

The statutes of that state further declare all rivers and streams of water that have been meandered and returned as navigable by the United States surveyor to be navigable.

Rev. Stat. of 1878, p. 477.

Moreover, the Supreme court of Wisconsin appears to hold, in the cases cited by counsel, that the Wisconsin legislature had no power to authorize the obstruction of a navigable public stream lying within the state lines; while the Supreme court of Illinois held the direct contrary in *Chicago* v. *McGinn*, *supra.*

It is clear, therefore, that the power of the State of Illinois over its rivers, as affected by national legislation prior to its admission as a state, is as great as that of the State of Wisconsin. Yet this court is on record as affirming the complete control of the State of Wisconsin over a river emptying into the Mississippi.

In *Pound* v. *Turck*, 5 Otto, 459 (1877), Mr. Justice MILLER, delivering the opinion of the court, says:

"The Chippewa river is a small stream lying wholly "within the State of Wisconsin, but emptying its waters "into the Mississippi. * * * We may concede that "the stream, though small, is a navigable river of the "United States, and protected by all the acts of congress "and provisions of the constitution applicable to such "waters.

"The principle established by the decisions * * is "that, in regard to the powers conferred by the commerce

"clause of the constitution, there are some which by their "essential nature are exclusive in congress, and which "the states can exercise under no circumstances; while "there are others, which from their nature may be exer- "cised by the states until congress shall see proper to "cover the same ground by such legislation as that body "may deem appropriate to the subject. Of this class are "pilotage and other port regulations, *Cooley* v. *Board o* "*Wardens*, 12 How., 299; bridges across navigable "streams, *Gilman* v. *Philadelphia;* and, as specially ap- "plicable to the case before us, to erect dams across navi- "gable streams, *Wilson* v. *Blackbird Creek Marsh Co.*, "2 Pet., 245. This general doctrine was very fully "examined and sustained in *Gilman* v. *Philadelphia*, 3 "Wall., 713, and again in *Crandall* v. *State of Nevada*, "6 *id.*, 35."

After discussing the *Blackbird Creek* and *Gilman* cases, the learned justice adds:

"The present case falls directly within the principle "established by these cases, and aptly illustrates its wis- "dom. * * * To the legislature of the state may be "most appropriately confided the authority to authorize "these structures where their use will do more good than "harm, and to impose such regulations and limitations "in their construction and use as will best reconcile "and accommodate the interest of all concerned in the "matter."

Following the decision in *Pound* v. *Turck*, the same rule was adopted in the *Beef Slough* cases in Wisconsin. The first of these cases was *Heerman* v. *Beef Slough, &c., Co.*, 8 Biss., 334, decided in 1878 by Justice Harlan and Judges Bunn and Drummond. There it was held that the state might authorize the Chippewa river to

be obstructed, and that, notwithstanding the river was a public highway, it was the province of the legislature to determine whether the benefit from the obstruction would not more than counterbalance the hindrance to navigation.

The second case is *United States* v. *Beef Slough, &c., Co.*, 8 Biss., 421, decided in 1879 by Judges Drummond and Bunn.

This was a bill in chancery brought in the name of the *United States*, to abate the works of the Beef Slough Company, on the Chippewa river. It will be noticed that it was sought in that case to sustain the bill on the ground that the works complained of would interfere with what had been done by congress in improving the river. The court held, however, that the acts of the defendant would not necessarily interfere with the government improvements. The bill was dismissed on demurrer, notwithstanding the admitted fact that the acts of defendant were a material obstruction to the navigation of the river, on the ground that such acts were authorized by the State of Wisconsin.

If the Chippewa river can be obstructed by authority of the State of Wisconsin, and the authority of the State has not been restricted by the territorial legislation relied on by appellant, then such legislation cannot be held to have curtailed the rights of the State of Illinois over its rivers. For, as we have seen, the legislation, if applicable at all, applies as well to Wisconsin as to Illinois.

It is not believed that the brief of appellee upon the remaining questions in the case can well be shortened, and the attention of the court is respectfully invited thereto.

Respectfully submitted.

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For Appellee.